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ABSTRACT

Judicial decisions affecting educational policy and management that were handed down in 1988 by state appellate courts and federal courts are summarized and analyzed in this book. The analyses, each written by one or more experts in education law, are divided into eight topical chapters: (1) employees; (2) bargaining; (3) pupils; (4) handicapped; (5) torts; (6) sports; (7) finance; and (8) higher education. The book includes a 14-page alphabetical index of cases cited in the text as well as a 5-page subject index. (MLF)

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THE YEARBOOK OF EDUCATION LAW 1989

Edited by

STEPHEN B. THOMAS

KENT STATE UNIVERSITY

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LEGAL PROBLEMS OF EDUCATION
TOPEKA, KANSAS

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INTRODUCTION

This chapter covers the nearly 230 cases reported in calendar year 1988 involving precollegiate, public-sector employees. This review excludes criminal cases and cases analyzed in other chapters of the Yearbook—tort and collective bargaining. Those cases which deal only with procedural matters are omitted and procedural matters are deemphasized in the remaining cases.

Unlike prior years, the year of 1988 saw no Supreme Court case related to school employment; however, Supreme Court decisions from prior years are cited where they are necessary for an understanding of current cases. As in previous years, the section on dismissal, nonrenewal, demotion, and discipline has the greatest concentration of cases.

DISCRIMINATION IN EMPLOYMENT

Discrimination claims are based on a number of federal statutes. Title VII of the Civil Rights Act of 1964, the workhorse of the anti-discrimination legislation, prohibits employment discrimination in both public and private institutions on the basis of race, color, religion, sex, and national origin.[1] Gender-based employment discrimination is prohibited by title IX of the Education Amendments of 1972[2] and gender-based wage discrimination is prohibited by the Equal Pay Act of 1963.[3] Discrimination on the basis of age for persons forty and over is prohibited by the Age Discrimination in Employment Act of 1975 (ADEA)[4] and discrimination against "otherwise qualified handicapped individuals" is prohibited under section 504 of the Rehabilitation Act of 1973.[5] Discrimination based on national origin is prohibited by section 1981 of the Civil Rights Act of 1964.[6]

In general, a plaintiff alleging employment discrimination must demonstrate a *prima facie* case: that plaintiff was burdened or was a

1. 42 U.S.C. § 2000 *et seq.*
2. 20 U.S.C. § 1681 *et seq.*
3. 29 U.S.C. § 206 (d) (1).
4. 42 U.S.C. § 1601 *et seq.*
5. 20 U.S.C. § 794 *et seq.*
6. 42 U.S.C. § 1981.

member of a class burdened[7] by an employer policy or practice affecting a category protected by one or more of the anti-discrimination statutes. The burden of proof then shifts to the employer to articulate by clear and convincing evidence a nondiscriminatory reason for the employee's treatment which the plaintiff can then attempt to refute by a preponderance of the evidence as pretextual.

Race

The burden of proof issue for both employee and employer was demonstrated in one of the federal district court cases.[8] A black junior high principal was nonrenewed in that position for violating school board policy regarding admitting students to the school's Isolated Learning Center, for low teacher morale, and for inadequate discipline. When the former principal was not hired for one of two vacant elementary principalships he alleged race discrimination. The school district was able to rebut plaintiff's *prima facie* case by producing evidence that: (1) removal of plaintiff from his principalship had been for administrative deficiencies; (2) other white applicants with poor records were not considered for the two positions; and (3) plaintiff's former female white assistant principal had been removed at the same time he had been removed as principal. However, in another case, a discharged black basketball coach was able to prove the pretextual nature of the school district's reasons for his discharge—win-loss record and a better qualified replacement—when the athletic director admitted that there were factors more important than win-loss records and the discharged coach was a better coach than his replacement.[9]

Generally, a charge of race discrimination will fail if the school can demonstrate that the reason for termination (e.g., teaching students the questions on a standardized achievement test) has been similarly applied to both black and white offenders.[10] In addition, in another case involving financial exigency, retention of a black male social worker over a white female social worker on the basis of an affirmative action plan, adopted to encourage greater minority distribution but not enacted to remedy prior governmental racial discrimination, was itself considered discriminatory because "the reservation of a particular position for a specific race in an affirmative action plan is invalid."[11]

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7. Ad Hoc Comm. of Concerned Teachers v. Greenburgh No. 11 Union Free School Dist., 687 F. Supp. 914 (S.D.N.Y. 1988).
8. Brown v. Springfield City Schools Bd. of Educ., 689 F. Supp. 783 (S.D. Ohio 1988).
9. Jackson v. Birmingham Bd. of Educ., 695 F. Supp. 1164 (N.D. Ala. 1988).
10. Scoggins v. Board of Educ. of Nashville, Ark., 853 F.2d 1472 (8th Cir. 1988).
11. Cunico v. Pueblo School Dist. No. 60, 693 F. Supp. 954, 958 (D. Colo. 1988).

Where race discrimination has been proved, "reinstatement [of a discharged teacher] is the preferred remedy to avoid future lost earnings" but only if the teacher has not voluntarily withdrawn herself from teaching by taking a job in an unrelated field and if animosity between the teacher and the school district would make reinstatement impracticable.[12] In addition, a discharged teacher will be eligible for backpay, minus wages earned, and front pay from the time a position came open for which plaintiff was not hired, minus pro-rata salary deduction for the time the teacher failed to apply for the vacant position.[13]

Religion

Two cases involving religious discrimination were reported. Religious discrimination at the hiring stage tends to be more narrowly defined than at the discharge stage. However, an applicant who had filed a title VII action alleging discrimination on the basis of religion when he was not hired failed to establish a *prima facie* case because even though "plaintiff stated that he was a preacher, defendant never asked and plaintiff never indicated which particular denomination or religion he espoused."[14] In a discharge case, a tenured high school teacher was properly discharged when, despite an earlier warning and four day suspension, his "repeated references in the classroom to Christianity, God, the devil and demons, exceeded the constitutional boundaries within which discourse is permissible . . . [under] the Establishment Clause."[15]

Sex

Females alleging sex discrimination were generally successful in their claims. A female teacher prevailed in her claim when, during eight years, she had received only one administrative appointment to the lowest paying principal position in the district, and was passed over for thirteen administrative positions all filled by men who were less qualified.[16] The court rejected the superintendent's claims that his appointments were made after talking with community leaders, other administrators, and board members when board members testified they were not consulted prior to making a selection. Plaintiff was entitled to

12. Ellis v. Ringgold School Dist., 832 F.2d 27, 30 (3d Cir. 1987).
13. Johnson v. Chapel Hill Indep. School Dist., 853 F.2d 375 (5th Cir. 1988).
14. Durham v. Bleckley County School Sys., 680 F. Supp. 1555, 1559 (M.D. Ga. 1988).
15. Rhodes v. Laurel Highlands School Dist., 544 A.2d 562, 565 (Pa. Commw. Ct. 1988).
16. Spears v. Board of Educ. of Pike County, Ky., 843 F.2d 882 (6th Cir. 1988).

back pay and front pay equal to the highest paying of the positions for which she was passed over. In another case, a female teacher was successful in her claim that she was discriminatorily not promoted to one of thirteen available administrative positions.[17] The school system's policy of advertising positions was considered ineffective because advertisements were not placed where everyone could read them, advertisements were ambiguous as to the nature of the position, and advertisements were unclear as to whether a person with an application on file had to resubmit. Plaintiff was entitled to backpay and benefits and right of first refusal to a high school or elementary principalship, but not reinstatement because that would have displaced an innocent person.

A high school board's attempt to combine the football coach and athletic director positions established an inference of discriminatory animus when a female P.E. teacher, who had coached all women's sports and had worked in some capacity in all men's sports, was not eligible for the previously separate athletic director position because she was presumably not qualified as a football coach. The court's response to the school's bona fide occupational qualification (BFOQ) argument that the athletic director had to be merged with football, the school's "dominant sport," was, "logical and reasonable it may be, legitimate and nondiscriminatory it is not."[18] In another case, a school board policy of requiring women to choose between pregnancy disability or unpaid child care leave, and which prevented women from taking consecutive pregnancy disability and infant care leaves of absence, constituted sex discrimination under state law because the policy more harshly affected women.[19]

The cost to school districts of a successful sex discrimination lawsuit can be considerable. In one case, a female assistant principal who had won reinstatement and backpay and interest, also was awarded $170,000 in attorney's fees after the court had adjusted the normal rate upwards by 100% to halt a decline in "the state's already too small pool of attorneys willing to take civil rights cases . . . ."[20]

However, not all sex discrimination claims were successful. In one case, alleged remarks by an interviewer that some male employees did not want to work for a female supervisor were found to have no causal connection to plaintiff's denial of promotion because the interviewer

17. Tye v. Houston County Bd. of Educ., 681 F. Supp. 740 (M.D. Ala. 1988).

18. Wynn v. Columbus Mun. Separate School Dist., 692 F. Supp. 672, 685 (N.D. Miss. 1988).

19. Department of Civil Rights v. Brighton Area Schools, 431 N.W.2d 65 (Mich. Ct. App. 1988).

20. Hidle v. Geneva County Bd. of Educ., 681 F. Supp. 752, 759 (M.D. Ala. 1988).

had no effective role in the promotion decision.[21] In yet another case, a court held that an employer is not guilty of sex discrimination merely because it does not like being harassed by baseless charges of sex discrimination for nonselection to higher positions and alleged retaliation after a second nonselection. When an applicant has never been one of two top candidates for two different positions, an employer is not guilty of sex discrimination simply because one of the charges against it happens to be sex discrimination.[22]

Age

The 1986 ADEA amendments eliminated the seventy-year-old ceiling, but a teacher who had retired prior to January 1, 1987, the effective date of the 1986 amendments, had no cause of action under ADEA.[23] Where a valid ADEA claim exists the burden of proof for a complainant can be significant. The burden of proof for a *prima facie* ADEA case is preponderance of the evidence, but once a school has presented evidence of a nondiscriminatory reason for nonrenewal, the standard for complainant to rebut that evidence is "clear and convincing."[24] In another case of some procedural importance, a federal district court determined that the E.E.O.C. has jurisdiction to investigate and enforce its subpoena even though the filing of an ADEA complaint occurred beyond the two year statute of limitations, but within the three year statute of limitations for willful violations. The court reasoned that E.E.O.C. does not have to establish existence of willful violations before it can investigate because it has the authority to investigate at any time.[25] Finally, under a state statute, a tenured teacher who lost tenure at age seventy could not be denied a year-by-year contract solely on the basis of age.[26]

Handicap

The leading U.S. Supreme Court decision in *School Board of Nassau County v. Arline*[27] played a prominent part in two recent cases. In the remand of *Arline* to the federal district court, the court determined that the teacher who had occasional relapses of tuberculosis was nonetheless "otherwise qualified" to be employed because "the probability that she

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21. Mira v. Monroe County School Bd., 687 F. Supp. 1538 (S.D. Fla. 1988).
22. Yatvin v. Madison Metro. School Dist., 840 F.2d 412 (7th Cir. 1988).
23. Williams v. Tucson Unified School Dist. No. 1 of Pima County, 760 P.2d 1081 (Ariz. Ct. App. 1987).
24. Graham v. Renbrook School, 692 F. Supp. 102 (D. Conn. 1988).
25. EEOC v. Ritenour School Dist., 692 F. Supp. 1068 (E.D. Mo. 1988).
26. Morrow v. Duval County School Bd., 514 So. 2d 1086 (Fla. 1987).
27. 480 U.S. 273 (1987).

[the teacher] would transmit tuberculosis to anyone was so extremely small as to not exist."[28] The court awarded back pay for the years 1979-83 when plaintiff attempted to mitigate damages and ordered her reinstated with full seniority and benefits, or in lieu of reinstatement, she was to receive $768,724 front pay from the 1988-89 school year. Following the lead of *Arline* a federal appeals court ordered a preliminary injunction to prevent reassignment for a teacher with AIDS of hearing-impaired students. The court reasoned that "section 504 allows the exclusion of an employee only if there is a *significant* risk of communicating an infectious disease to others."[29]

In two other cases finding for plaintiff-employees, a state could not revoke a bus driver's license simply because he had diabetes, as long as there was no evidence plaintiff's diabetes impaired his operation of a bus,[30] and a school district could not terminate a bus driver on the recommendation of the school district's physician without the driver first having an opportunity to be examined by a cardiologist.[31] On the other hand, a school does not have to offer a disabled employee available and suitable positions if the positions required student contact and the nature of the employee's disability would have caused her to reject the offers.[32] Finally, section 504 is not an exclusive remedy for handicapped persons. Handicap discrimination can be brought under either section 504 or section 1983, or both.[33]

SUBSTANTIVE CONSTITUTIONAL RIGHTS

Cases reviewed in this section concern freedom of speech, association, and religion; the right to privacy; and the right of those with liberty and property interests not to be treated by government in an arbitrary or capricious fashion (i.e., the right to substantive due process under the fourteenth amendment—where state government is concerned; or under the fifth amendment—where the federal government is concerned). In general, a state statute providing that a substitute teacher had to repay unemployment compensation benefits received during holiday

28. Arline v. School Bd. of Nassau County, Fla., 692 F. Supp. 1286, 1292 (M.D. Fla. 1988).

29. Chalk v. United States Dist. Ct. Cent. Dist. of Cal., 840 F.2d 701, 707-8 (9th Cir. 1988) (emphasis in original).

30. Jackson v. State, 544 A.2d 291 (Me. 1988).

31. Sitler v. New York State Div. of Human Rights, 520 N.Y.S.2d 653 (App. Div. 1987).

32. Robinson v. School Dist. No. 1, Multnomah County, 759 P.2d 1116 (Or. Ct. App. 1988).

33. Cordero Martinez v. Aponte-Roque, 685 F. Supp. 314 (D.P.R. 1988).

periods because he had an assurance of reemployment was not violative of substantive due process.[34]

Speech

Protected free speech is limited to matters of public concern. A dismissed teacher and coach, who alleged his comments about the reason for his earlier dismissal as coach were protected free speech, was engaged only in self-serving statements of private concern, not matters of public concern.[35] Similarly, a school district employee dismissed with two others after an altercation was unsuccessful in his claim that his dismissal was retaliation for his participation in a grand jury investigation of school district expenses, when the employee could not prove "substantial probability" that his supervisor acted with a retaliatory motive.[36]

In a reverse free speech case, a white principal of a mostly black elementary school who was reassigned after verbal accusations by mostly black parents, did not have a civil rights complaint against the parents because the parents' charges were opinions only and were protected free speech. Some of the charges were "[the principal is] very insensitive to the needs of our community;" "she is a racist;" "our children are afraid of her;" "we do not need a dictatorship in our children's school."[37]

Association

School employee association rights tend to focus on employment decisions allegedly based on an employees' political affiliation or union activity. The largest category of association rights cases continues to involve the change of political parties in the 1984 Puerto Rican election and the termination of employees of the losing party. In all four reported cases the discharged employees lost in their association right claims because the education employer was able to demonstrate nondiscriminatory reasons for its decisions: elimination of a position that had been created in violation of state statutes;[38] discharge of fixed-term employees at the end of their contracts with no evidence that the discharges were because of political affiliation;[39] and the transitory nature of an

34. Berland v. Employment Security Dep't of Wash., 760 P.2d 959 (Wash. Ct. App. 1988).

35. Vukadinovich v. Bartels, 853 F.2d 1387 (7th Cir. 1988).

36. Hughes v. Halifax County School Bd., 855 F.2d 183, 186 (4th Cir. 1988).

37. Stevens v. Tillman, 855 F.2d 394, 400 (7th Cir. 1988).

38. Rojas v. Aponte-Roque, 678 F. Supp. 23 (D.P.R. 1987); Carrasquillo v. Aponte-Roque, 682 F. Supp. 137 (D.P.R. 1988).

39. Hernandez Acevedo v. Aponte Roque, 684 F. Supp. 18 (D.P.R. 1988).

employee's position which was subject to annual renewal.[40]

In yet another case, a discharged teacher was not able to establish a *prima facie* case under a "but for" test that she was discharged for union activity when her discharge was supported by weak discipline, poor working relationships with administrators, and poor attitude toward work assignments.[41] Under the "but for" test an employee's claim is defeated if the employer can prove by a preponderance of the evidence that the discharge would have occurred anyway for a legitimate reason even had the employee been able to make out a *prima facie* case of discharge for union activity. On the other hand, a school board's termination of an automatic payroll dues deduction service for the local NEA affiliate was held to state a section 1983 cause of action to destroy associational rights where the local association lost members and dues revenues after the termination.[42]

Privacy

In the one case reported in this area, a school board did not violate a teacher's privacy rights when it required, after the teacher had allegedly grabbed a student in a stranglehold, that the teacher see a psychiatrist before returning to work. Because the information revealed to the psychiatrist about marriage, family history, and other personal relationships was not revealed to the school board, there was no invasion of privacy. "A school committee . . . may justifiably compel a teacher or administrator to submit to a psychiatric examination as a condition of continued employment if the committee has reason to believe that the teacher or administrator may be jeopardizing the welfare of students under his supervision."[43]

Substantive Due Process

Violation of substantive due process tends to occur when state actions are arbitrary, capricious, or unfair in substance, rather than lacking in procedural correctness, so as to deprive a school employee of a property or liberty right. Substantive due process was not denied when a probationary administrator whose position was eliminated was offered a lower position, although the highest position available at that time, because probationary employees had no entitlement to continued

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40. Vazquez v. Aponte Roque, 678 F. Supp. 37 (D.P.R. 1988).

41. Hardin County Educ. Ass'n v. Illinois Educ. Labor Relations Bd., 528 N.E.2d 737 (Ill. App. Ct. 1988).

42. Georgia Ass'n of Educators v. Gwinnett County School Dist., 856 F.2d 142 (11th Cir. 1988).

43. Daury v. Smith, 842 F.2d 9, 14 (1st Cir. 1988).

employment and thus no protectable property interest.[44] Similarly, a state statute denying credit for military service toward a teacher's retirement pension was held to further a legitimate state interest of preventing an unnecessarily duplicative state expense and did not violate any constitutional rights of the teacher.[45]

PROCEDURAL DUE PROCESS

As a sequel to *Cleveland Board of Education v. Loudermill*,[46] the court of appeals affirmed the district court's determination on remand that a dismissed tenured school security guard had received constitutionally mandated requirements when he was confronted with a discrepancy on his application and failed to furnish clarifying evidence during the next four-to-five days.[47] The procedural due process provided the security guard accorded with the Supreme Court's standard for a pretermination hearing of a tenured employee: oral or written notice of charges; explanation of the employer's evidence; and an opportunity for the employee to present his side. However, the discharged guard was entitled to attorney's fees as the prevailing party because the Supreme Court decision had established new procedural law. The *Loudermill* conclusion seems to have been reinforced in another case where failure of a school board to follow proper procedures under the state code in cancelling a principal's contract did not necessarily state a section 1983 claim because "a section 1983 due process claim is not controlled by state law" but by federal constitutional standards.[48]

Procedural due process very much flows from employment entitlement, such as tenure, or from contractual requirements. Thus, a tenured teacher who resigned prior to his dismissal hearing before the school board had no procedural due process claims because upon resignation he lost "his property and tenure rights to that job."[49] However, an oral resignation will not terminate a protectable property interest and a procedural right to a due process hearing if state law provides that public officers can resign only in writing.[50] In another case, an employer terminated without notice of charges or opportunity for a hearing had a viable cause of action because an entitlement exists when contract

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44. Smith v. Board of Educ. of Chicago, 853 F.2d 517 (7th Cir. 1988).
45. Morris v. Public School Employees Retirement Sys., 538 A.2d 1385 (Pa. Commw. Ct. 1988).
46. 470 U.S. 532 (1985).
47. Loudermill v. Cleveland Bd. of Educ., 844 F.2d 304 (6th Cir. 1988).
48. Ray v. Birmingham City Bd. of Educ., 845 F.2d 281, 283 (11th Cir. 1988).
49. Swann v. Caylor, 516 So. 2d 699, 701 (Ala. Civ. App. 1987).
50. Petrella v. Siegel, 843 F.2d 87 (2d Cir. 1988).

language states "that an employee can be fired only upon a showing of 'good cause.'"[51]

A party whose procedural due process rights have been violated may nonetheless find that any financial award is minimal. An assistant principal discharged for insubordination was entitled to only $1.00 nominal damages for deprivation of procedural rights, because even if all due process had been satisfied, the plaintiff assistant principal would still have been fired.[52] In addition, plaintiff was denied section 1983 compensatory damages or tort theory principles of impairment of reputation, personal humiliation, and mental anguish, and plaintiff was awarded attorneys' fees only for the time spent on the procedural due process representation.

Liberty and Property Interests

Some cases implicate both liberty and property interests. A school principal denied consideration for a deputy superintendent position because of a prior conflict of interest conviction had no protectable liberty interest because he was not deprived of "liberty to pursue a broad range of employment opportunities in the field of education" and no one had stigmatized him "by publishing false, defamatory information."[53] The principal also had no property interest in being considered for a vacant position. Similarly, a head baseball coach nonrenewed as coach had no property right where state tenure law did not grant tenure to assignments additional to teaching and he had not been stigmatized by difficulty in finding another coaching job because "disappointment is not a loss of that liberty which the Constitution guarantees."[54]

Liberty claims very often relate to an employee's reputation. However, courts have tended to impose a "stigma plus" standard, namely that reputation be tied to a tangible benefit such as employment. Thus, a nonrenewed basketball coach who retained his teaching job had no liberty claim, especially where the school board had refused to give any public reasons for the nonrenewal.[55] Similarly, a list of six school board reasons for dismissing a superintendent which included "ineffective leadership" and "lack of communication with personnel" did not implicate a liberty interest because they "[did] not involve moral turpitude or even an intrinsic character defect," but rather were "unelaborated charges relating to job performance suggest[ing] a

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51. Courtemanche v. Enlarged City School Dist., 686 F. Supp. 1025, 1028 (S.D.N.Y. 1988).
52. Rogers v. Kelly, 674 F. Supp. 1372 (E.D. Ark. 1987).
53. Lavelle v. Quinones, 679 F. Supp. 253, 256 (E.D.N.Y. 1988).
54. Lagos v. Modesto City Schools Dist., 843 F.2d 347, 350 (9th Cir. 1988).
55. Diehl v. Albany County School Dist. No. 1, 694 F. Supp. 1534 (D. Wyo. 1988).

situational difficulty that, as part of [plaintiff's] biography, invite inquiry, not prejudgment."[56] In a similar vein, a teacher advised by a consultant to visit a dentist to improve the conditions and appearance of teeth and to lose weight did not have a liberty claim because the school district took no action to compel compliance.[57] Finally, a teacher was not entitled to a name-clearing hearing after allegedly false and defamatory charges had been removed from his personnel file. "That potential employers *could* have gained access to [plaintiff's] file in the interim period before removal of the allegations is not of sufficient consequence by itself to implicate a liberty interest under the fourteenth amendment."[58]

A reduction in an employee benefit will not necessarily implicate a constitutional property interest if there is an adequate state remedy. Thus, reduction in accumulated sick days so that a teacher's unused sick leave days were reduced from 142 to twenty-nine did not present a property claim where "the deprivation is a simple breach of contract and there is adequate state breach of contract action available as a remedy."[59]

Aspects of Notice

Some courts have tended to strictly construe notice requirements. Thus, when a state statute requiring ninety days written notice of inadequate classroom performance prior to giving notice of intention not to reemploy was not followed, the teacher was entitled to a contract for one more year.[60] Even in the absence of a statute specifying a number of days, notice to terminate a teacher must be reasonable. Thus, reception by tenured teachers one or two days prior to a school board dismissal hearing of letters of intent to terminate was held unreasonable because "it deprived the teachers of any opportunity to challenge the bases for their proposed dismissals."[61] However, the constitutional standard for notice will be satisfied as long as the employee received notice of charges and had an opportunity to refute the charges and present mitigating circumstances. Those constitutional criteria were met for an employee who was notified of reprimand and possible future action as a result of an altercation with the president of the school board.

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56. Bristol, Va. School Bd. v. Quarles, 366 S.E.2d 82, 86-87 (Va. 1988).
57. Mermer v. Constantine, 520 N.Y.S.2d 264 (App. Div. 1987).
58. Brandt v. Board of Coop. Educ. Servs., 845 F.2d 416, 418 (2d Cir. 1988).
59. Ramsey v. Board of Educ. of Whitley County, Ky., 844 F.2d 1268, 1273 (6th Cir. 1988).
60. Wheeler v. Yuma School Dist. No. 1, 750 P.2d 860 (Ariz. 1988).
61. Farley v. Board of Educ. of County of Mingo, 365 S.E.2d 816, 819 (W. Va. 1988).

The employee in fact responded the following day with his version of the incident, and was notified later that in addition to a reprimand he would be reassigned.[62]

Aspects of Hearing

A considerable amount of litigation involving hearings has highlighted the profuse number of issues in this area. In two cases, the United States Supreme Court's decision in *Cleveland Board of Education v. Loudermill*[63] was subjected to interpretation. A tenured teacher's due process rights were violated when he was not provided a pretermination hearing prior to a school board's nonrenewal decision,[64] but *Loudermill* did not extend to a predemotion hearing where declining class size resulted in teacher reduction from full to part-time.[65] However, under *Loudermill*, failure to accord an employee an appropriate pretermination hearing (if required) will deprive the supervisor or administrator of qualified immunity in a section 1983 lawsuit if "infringement of [the employee's] right to procedural due process should have been apparent to a reasonable official . . . ."[66]

In general, a full hearing is not constitutionally required for probationary teachers if state law provides that the probationary teacher "may be terminated without a hearing and without specific reasons being stated . . . ."[67] However, where a hearing is required, an employee will have been considered to have been deprived of the "minimal requirements of fair play" where he was denied prior to the hearing a list of those making allegations against him and specific facts supporting the charges, and was denied during the hearing an opportunity to cross-examine witnesses.[68]

Employees will sometimes claim that an infirmity in a hearing entitles them to a new hearing. However a new hearing is not required if the employee had actual notice of the statutory provision he claims is the basis for a new hearing and, in fact, had an opportunity to be heard.[69] But a new hearing was ordered when, during a lunch recess in the original hearing, the hearing officer's sitting with the witness and counsel

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62. Steele v. Board of Educ. Inglewood Unified School Dist., 251 Cal. Rptr. 360 (Ct. App. 1988).
63. 470 U.S. 532 (1985).
64. Short v. Kiamichi Area Vocational Technical School Dist. No. 7, 761 P.2d 472 (Okla. 1988).
65. Reed. v. Vocational Technical School, 535 A.2d 1229 (Pa. Commw. Ct. 1988).
66. Runge v. Dove, 857 F.2d 469, 472 (8th Cir. 1988).
67. Blum v. Quiniones, 526 N.Y.S.2d 611 (App. Div. 1988).
68. Casada v. Booneville School Dist. No. 65, 686 F. Supp. 730, 732 (W.D. Ark. 1988).
69. Degnan v. Bering Strait School Dist., 753 P.2d 146 (Alaska 1988).

for the school board was considered to be an "appearance of impropriety."[70]

The most frequently litigated issue concerning hearings is whether they are impartial, but the proof required to show lack of impartiality or bias is formidable. Employees have been unsuccessful in their claims for a new hearing where they have not been able to prove "actual bias in the proceeding"[71] or "a substantial temptation [by a board member] to prejudge the case."[72] In one case, a letter of notice from the Commissioner of Education to RIF two teachers, incorrectly stating that the teachers' contracts would be terminated and implying board action, was insufficient to establish that the board was not impartial when it later voted to terminate the two teachers.[73] The mere fact that members of a school board perform an investigative/prosecutorial function in issuing a termination notice to a continuing teacher and then perform an adjudicative function in holding the hearing does not establish "actual bias or partiality."[74] However, evidence of malice toward a discharged employee by one of the school board members will be sufficient to prevent granting a motion for summary judgment for a defendant school board.[75]

Occasionally, federal constitutional claims were raised regarding hearings, but all were unsuccessful. A tenured teacher had no right under either the Constitution or the state dismissal statute "to be adequately represented by counsel in a civil matter or an administrative hearing."[76] In one case reported at both district and appeals court levels, courts found no fifth amendment self-incrimination where an employee facing a dismissal hearing and a criminal charge for the same act was refused his request to have the dismissal hearing postponed. The courts found no constitutional requirement that a hearing be postponed "pending disposition of the criminal charges"[77] and no constitutional infirmity in requiring the employee "to choose between giving testimony at the discharge hearing, a course that may help the criminal prosecutors, and keeping silent, a course that may lead to the loss of employment."[78]

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70. Wells v. Del Norte School Dist., 753 P.2d 770, 772 (Colo. Ct. App. 1988).
71. Plymouth-Canton Community School Dist. v. State Tenure Comm'n, 419 N.W.2d 783, 785 (Mich. Ct. App. 1988).
72. State Tenure Comm'n v. Randolph County Bd. of Educ., 523 So. 2d 1076, 1077 (Ala. Civ. App. 1988).
73. Heithoff v. Nebraska State Bd. of Educ., 430 N.W.2d 681 (Neb. 1988).
74. Rouse v. Scottsdale Unified School Dist., 752 P.2d 22, 27 (Ariz. Ct. App. 1988).
75. Cook v. Board of Educ. for the County of Logan, 671 F. Supp. 1110 (S.D. W. Va. 1987).
76. Wolfe v. Board of Educ. of Chicago, 524 N.E.2d 1177, 1179 (Ill. App. Ct. 1985).
77. Peiffer v. Lebanon School Dist., 848 F.2d 44, 46 (3d Cir. 1988).
78. Peiffer v. Lebanon School Dist., 673 F. Supp. 147, 151 (M.D. Pa. 1987).

DISMISSAL, NONRENEWAL, DEMOTION, AND DISCIPLINE

State statutes, local board policies, and local collective bargaining contracts outline the procedures that must be followed and the charges that may be levied when employees are subjected to many types of adverse employment actions. Defining the nature of discipline and analyzing the broad range of effects of discipline or teacher removal constituted the largest category of cases. A teacher who had charges for dismissal dropped against him after two years was not entitled to salary increases for those two years because failure to award a salary increase was not *de facto* discipline under state law.[79] A teacher holding an indefinite teaching contract, and also a definite year-by-year principal's contract, could have his principal position terminated when his teaching contract was terminated because one contract was dependent on the other.[80] A school bus operator dismissed for failing to have working flashing lights was considered to have been dismissed for willful neglect of duty and was ineligible for unemployment compensation benefits.[81] However, in another case, a school employee's indefinite suspension without assurance of reinstatement made the employer eligible for unemployment compensation.[82] A discharged tenured high school teacher who lost his lawsuit for reinstatement was assessed over $10,000 of the school board's attorneys fees.[83] On the other hand, the effects of discipline may be unfavorable to a school district, or simply not unfavorable to the employee. A teacher who took an unapproved leave of absence for illness could not, under state law, have those days subtracted from his seniority so as to affect priority for furlough.[84] In one case, the burden of proof was on the school board to prove the amount of mitigating wages a wrongfully discharged teacher could have earned[85] and in another case wages earned by a wrongfully discharged teacher during the summer could not be used to reduce a backpay award.[86] When another teacher was awarded six months backpay, he was also entitled to an award of attorneys' fees even though it was not clear whether the backpay was awarded under the breach of contract or section 1983 claim.[87] In a special category of teacher removal cases,

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79. Horton v. Jefferson County-Dubois Area Vocational Technical School, 545 A.2d 1294 (Ind. Ct. App. 1987).

80. Chambers v. Central School Dist. School Bd. of Greene County, 514 N.E.2d 1294 (Ind. Ct. App. 1987).

81. Prine v. West Carroll Parish School Bd., 515 So. 2d 1196 (La. Ct. App. 1987).

82. Pueblo School Dist. v. Martinez, 749 P.2d 1005 (Colo. Ct. App. 1988).

83. Introcaso v. Cunningham, 857 F.2d 905 (4th Cir. 1988).

84. Big Beaver Falls Area School Dist. v. Cucinelli, 545 A.2d 1205 (Pa. Commw. Ct. 1988).

85. State v. Bexley City School Dist., 528 N.E.2d 1250 (Ohio 1988).

86. Harris v. Bauer, 749 P.2d 1068 (Mont. 1988).

87. Lofft v. State Bd. of Higher Educ., 750 P.2d 515 (Or. Ct. App. 1988).

special school board agreements to remove teachers in lieu of teacher litigation against the board[88] or in lieu of a disciplinary hearing against the teacher[89] have been upheld.

School board dismissals have been upheld where the teacher did not abide by the district's residency requirements[90] and where the teacher had been on disability leave for more than twelve months.[91] School board nonrenewal of an employee has been upheld where the employee had received notice required by statute,[92] the employee had failed to give the school board timely notice of his intent to return to teaching after a leave of absence,[93] and the board's decision was for a lawful, rational, nonarbitrary, nonstatutory reason.[94] A final category involved interpretation of collective bargaining contracts or the relationship between those contracts and state law. In one case, dismissal of a nontenured teacher was found to be subject to the grievance procedure in the collective bargaining agreement.[95] But in two other cases, the state tenure statute preempted the collective bargaining contract and a probationary teacher could be nonrenewed without cause.[96] Collective bargaining provisions which include a special incentive to encourage early retirements will be upheld as long as they are not subterfuges for circumventing the state tenure statute.[97]

Insubordination

School boards were successful in discharging employees for insubordination in a wide range of situations. Employees were successfully discharged for continually refusing to wear a nursing cap[98] and for continued use of profanity in the presence of students after a prior directive to cease.[99] A school principal who had conducted thirty observations of a teacher and then refused to cooperate at the teacher's

88. Emerick v. Teaneck Bd. of Educ., 534 A.2d 1044 (N.J. Super. Ct. App. Div. 1987).
89. Cooke v. Board of Educ. of Lawrence School Dist., 528 N.Y.S.2d 140 (App. Div. 1988).
90. McClelland v. Paris Pub. Schools, 742 S.W.2d 907 (Ark. 1988).
91. *In re* Johnson, 415 N.W.2d 751 (Minn. Ct. App. 1987).
92. Guyse v. Morgan County Bd. of Educ., 516 So. 2d 692 (Ala. Civ. App. 1987).
93. Kolenberg v. Board of Educ. of Stamford, 536 A.2d 577 (Conn. 1988).
94. Spurlin v. School Bd. of Sarasota County, 520 So. 2d 294, 296 (Fla. Dist. Ct. App. 1988).
95. Mifflinburg Area Educ. Ass'n v. Mifflinburg Area School Dist., 545 A.2d 419 (Pa. Commw. Ct. 1988).
96. Fontana Teachers Ass'n v. Fontana Unified School Dist., 247 Cal. Rptr. 761 (Ct. App. 1988); Miller v. Board of Educ., Unified School Dist. 470, 744 P.2d 865 (Kan. Ct. App. 1987).
97. Board of Educ. for the Garden City Dist. v. Brisbois, 417 N.W.2d 84 (Mich. Ct. App. 1987).
98. Distelzweig v. Hawkes Hosp. of Mt. Carmel, 518 N.E.2d 43 (Ohio Ct. App. 1986).
99. Ware v. Morgan County School Dist., 748 P.2d 1295 (Colo. 1988).

dismissal hearing with the result the charges against the teacher had to be dropped could be suspended twenty-four days for insubordination.[100] A charge of insubordination was upheld in two separate cases where teachers publicly shouted at their principals in the presence of students and generally treated them in a disrespectful manner.[101]

However, insubordination charges have not been upheld in all situations. A teacher was not insubordinate when she refused to attend a convocation with religious content, especially when the principal had announced to the school that anyone could be excused who objected on religious or other grounds.[102] A tenured teacher who had problems oversleeping and who failed to meet with summer school students while teaching on a special summer contract could not have his regular year contract terminated for insubordination on the basis of what occurred under a separate contract.[103]

Unprofessional Conduct, Unfitness, Willful Neglect of Duty

School boards have generally been successful in disciplining or removing employees under this broad category. Teacher dismissals have been upheld where teachers have verbally or physically assaulted or abused students[104] and have drunk beer with students at an away basketball game.[105] A one-year suspension was upheld for a teacher who furnished students advance information about examination questions[106] and for a teacher on full disability leave who taught at two other schools.[107] Dismissals were upheld for employees who failed to follow the district's purchase procedures,[108] who used obscene language to fellow employees and vendors,[109] and who made numerous phone calls to an administrator during early morning hours without a legitimate communication purpose.[110] In a different vein, a substitute teacher, whose name was dropped from the substitute list for "misconduct"

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100. Stutzman v. Chicago Bd. of Educ., 525 N.E.2d 596 (Ill. App. Ct. 1988).

101. Caldwell v. Blytheville Ark. School Dist., 746 S.W.2d 381 (Ark. Ct. App. 1988); Kleinberg v. Board of Educ., 751 P.2d 722 (N.M. Ct. App. 1988).

102. Werblo v. Hamilton Heights School Corp., 519 N.E.2d 185 (Ind. Ct. App. 1988).

103. Fisher v. Board of School Trustees of the Mt. Pleasant Township Community Schools, 514 N.E.2d 626 (Ind. Ct. App. 1986).

104. *In re* Cowan, 541 A.2d 298 (N.J. Super. Ct. App. Div. 1988); Turner v. Alabama State Tenure Comm'n, 523 So. 2d 401 (Ala. Civ. App. 1987); Friedland v. Ambach, 522 N.Y.S.2d 696 (App. Div. 1987).

105. Blaine v. Moffat County School Dist. No. 1, 748 P.2d 1280 (Colo. 1988).

106. Hyde Park Cent. School Dist. v. Ambach, 530 N.Y.S 2d 902 (App. Div. 1988).

107. Bassett Unified School Dist. v. Commission on Professional Competence, 247 Cal. Rptr. 865 (Ct. App. 1988).

108. Spradlin v. Board of Trustees of Pascagoula Mun. Separate School Dist., 515 So. 2d 893 (Miss. 1987).

109. Secor v. Hyde Park Cent. School Dist., 530 N.Y.S 2d 599 (App. Div. 1988).

110. Schuster v. Babylon Union Free School Dist., 526 N.Y.S 2d 191 (App. Div. 1988).

because she was repeatedly unavailable, did not have an action for defamation.[111]

Teachers prevailed in three cases. In one case, a teacher's reference to a girl as a "slob" and an overweight boy as "Goodyear" did not support contract termination.[112] In a second case, a teacher discharged after failing a star basketball player was ordered reinstated.[113] In that case, the teacher had been threatened by athletic department personnel, had a petition for dismissal circulated by the basketball coach's daughter, had a bullet shot through her car windshield while she was driving her car, and was subjected to a school button sale celebrating the shooting. In a state labor relations case, a decision by a school board not to renew a tenured teacher as assistant track coach after he had pleaded guilty to a DWI charge was an unfair labor practice.[114]

Immorality

Courts have tended to uphold school board dismissals where immorality is involved. Teacher dismissals were upheld for writing "disgusting, disturbing and upsetting" letters to students,[115] for fondling the genital area of a typewriter salesman,[116] and for providing alcohol to underaged students.[117] Discharge of a teacher's aide for having sexual intercourse with a female juvenile-student-detainee was also upheld.[118] However a teacher could not be dismissed for immoral conduct where she falsely reported she was ill so she could attend the landing of the space shuttle.[119] Similarly, a teacher who had engaged in "horseplay" in spraying students with a liquid substance could not be discharged for immorality despite an administrative directive teachers would be punished if they engaged in such conduct with students on the last day of school.[120]

Incompetence

A broad range of conduct can be included with a charge of

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111. Goralski v. Pizzimenti, 540 A.2d 595 (Pa. Commw. Ct. 1988).
112. Trustees of Lincoln County School Dist. v. Holden, 754 P.2d 506 (Mont. 1988).
113. McGhee v. Miller, 753 S.W.2d 354 (Tenn. 1988).
114. Board of Educ. of Danville Community Consol. School Dist. v. Illinois Educ. Labor Relations Bd., 529 N.E.2d 1110 (Ill. App. Ct. 1988).
115. Dohanic v. Commonwealth, 533 A.2d 812, 815 (Pa. Commw. Ct. 1987).
116. Stephans v. Board of Educ. of School Dist. No. 5, 429 N.W.2d 722 (Neb. 1988).
117. Norton v. Board of Educ. of Jefferson County Schools, 748 P.2d 1337 (Colo. Ct. App. 1987).
118. School Bd. of Seminole County v. Unemployment Appeals Comm'n, 522 So. 2d 556 (Fla. Dist. Ct. App. 1988).
119. Fontau Unified School Dist. v. Burman, 753 P.2d 689 (Cal. 1988).
120. Everett Area School Dist. v. Ault, 548 A.2d 1341 (Pa. Commw. Ct. 1988).

incompetence. In one case, discharge of a tenured teacher was supported by smoking in front of students in the classroom, using inappropriate language in front of students and fellow employees, leaving the classroom unattended, failing to submit proper plans, using inappropriate classroom materials that created danger to students, and making harassing phone calls to a female assistant principal.[121] In cases with less sweeping charges, teacher dismissal has been upheld for ineffective classroom discipline[122] and for failure to remedy teaching deficiencies for such matters as outlining objectives, sequencing subject matter, following lesson plans, and maintaining adequate and accurate grades.[123] Dismissal of an account clerk was upheld for transferring, without authorization, funds from one account to another so that she could be paid.[124]

In only one case was a teacher successful. A teacher seeking a transfer in the district after her position had been eliminated and who did poorly in four structured interviews could not be discharged solely on the basis of the interviews when her thirteen years of satisfactory classroom performance were not taken into consideration.[125]

Compliance with School Board Policies and State Statutes

Courts have tended to give great latitude to school boards in complying with a variety of statutory requirements. A school board policy regarding notice of nonrenewal for probationary teachers enacted pursuant to a state statute could be applied to all probationary teachers, "whether they are employed before or after the policy is adopted."[126] Compliance with various aspects of statutory notice has been generously construed. Thus, written notice of charges for dismissal which did not comply with statutory requirements were considered adequate, where the letter regarding dismissal referred to a formal evaluation given one month earlier[127] and where the teacher's defense at the full adversarial hearing dealt squarely with the grounds for dismissal.[128] In two other cases, a statutory requirement of a decision

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121. Bradshaw v. Alabama State Tenure Comm'n, 520 So. 2d 541 (Ala. Civ. App. 1988).

122. Mongitore v. Regan, 520 N.Y.S.2d 194 (App. Div. 1987).

123. DeBernard v. State Bd. of Educ., 527 N.E.2d 616 (Ill. App. Ct. 1988); Atherton v. Board of Educ. of School Dist. of St. Joseph, 744 S.W.2d 518 (Mo. Ct. App. 1988).

124. Van Gorder v. Board of Educ. of Unatego Cent. School Dist., 527 N.Y.S.2d 654 (App. Div. 1988).

125. Trustees, Missoula County School Dist. No. 1 v. Anderson, 757 P.2d 1315 (Mont. 1988).

126. Central Educ. Agency v. George West Indep. School Dist., 750 S.W.2d 900 (Tex. Ct. App. 1988).

127. Adkins v. Hazelwood School Dist., 743 S.W.2d 869 (Mo. Ct. App. 1987).

128. Thompkins v. Stuttgart School Dist., 858 F.2d 1317 (8th Cir. 1988).

five days after a dismissal hearing was interpreted to mean a reasonable amount of time[129] and a statutory requirement of a registered letter with notice of extension, reasons, and corrective measures was interpreted to mean actual notice.[130] In one case, a nonrenewal notice received one day prior to the last day of employment satisfied state law,[131] but in another state, where efforts at remediation had to precede nonrenewal, reception of notice of nonrenewal on the last possible day did not comply with the state statute as a matter of law.[132] In a nonnotice case, a court upheld under state law a collective bargaining contract provision permitting assessment of service fees to nonunion teachers even when the service fee exceeded the cost of union dues.[133]

Courts have upheld a wide range of school board decisions and policies made pursuant to state statutes: dismissal of a teacher for excessive force toward students in violation of board policies;[134] termination of a tenured teacher who returned her contract one day late;[135] and termination of teachers who did not meet appropriate certification requirements.[136] Teachers also lost in a variety of other board decisions made pursuant to state statutes: discontinuance of local school district salary supplements which exceeded the statutory minimum base salaries and increments;[137] denial of a contractual benefit for the time between a board hearing at which a procedural error occurred and a subsequent hearing at which the error was corrected;[138] and denial of back salary after a probationary teacher's nonrenewal had been reversed.[139]

A number of cases have found that school board actions have not complied with state law; a finding of a breach of duty where the same person, serving as superintendent of public schools and a township trustee, voted on a tax issue;[140] attempting to maintain a teacher termination proceeding for an indefinite period of time in violation of

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129. Larsen v. Oakland Community School Dist., 416 N.W.2d 89 (Iowa Ct. App. 1987).

130. Matthiessen v. Board of Educ. of N. Chicago Community High School Dist. 124, 857 F.2d 404 (7th Cir. 1988).

131. Wright v. Tarrant City Bd. of Educ., 518 So. 2d 144 (Ala. Civ. App. 1987).

132. McCrackin v. Elko County School Dist., 747 P.2d 1373 (Nev. 1987).

133. Kilpatrick v. Board of Educ. of Fairfield, 535 A.2d 1311 (Conn. 1988).

134. Dooley v. Fort Worth Indep. School Dist., 686 F. Supp. 1194 (N.D. Tex. 1987).

135. Niedbalski v. Board of Educ. of School Dist. No. 24 of Platte Center, 418 N.W.2d 565 (Neb. 1988).

136. Abell v. Nash County Bd. of Educ., 365 S.E.2d 706 (N.C. Ct. App. 1988); Bradley v. Beach Pub. School Dist., 427 N.W.2d 352 (N.D. 1988); Feldhusen v. Beach Pub. School Dist., 423 N.W.2d 155 (N.D. 1988).

137. Allen v. Lumberton Indep. School Dist., 746 S.W.2d 524 (Tex. Ct. App. 1988).

138. Parliament v. Yukon Flats School Dist., 760 P.2d 513 (Alaska 1988).

139. Frasier v. Board of Educ. of the City School Dist. of N.Y., 530 N.Y.S.2d 79 (App. Div. 1988).

140. Contesti v. Attorney General, 416 N.W.2d 410 (Mich. Ct. App. 1987).

the Fair Dismissal Act;[141] failure to give adequate nonrenewal notice prior to a school merger with the result that the new school district was bound to honor the teachers' contracts;[142] refusal to permit employee discovery of personnel records to determine if his discharge was for justifiable cause;[143] attempting to nonrenew a teacher for refusing to accept a supplemental contract for coaching;[144] and attempting to impose multiple penalties of reprimand and suspension upon a teacher when state statute required choosing only one penalty.[145] A school board's effort to reduce a teacher's salary to 80% when she was reduced to 4/5 teaching load was held to be a termination under the state tenure law and thus subject to procedure criteria.[146] A school board must accept the factual finding of a statutory referee in a termination hearing, unless against the preponderance of the evidence[147] and a school custodian who alleged he was discharged for filing a workman's compensation claim was entitled to trial on a state law retaliation theory.[148] In an unusual case involving an extraordinary writ, a grounds employee whose firing was disaffirmed by the state's Civil Service Commission was entitled to a writ of mandamus for reinstatement.[149]

REDUCTION-IN-FORCE AND INVOLUNTARY LEAVES OF ABSENCE

Reorganization or consolidation of school districts or property within districts, declining student enrollments, or fiscal restraints may necessitate a reduction-in-force (RIF). The sufficiency of reasons for RIF, the actual selection of employees to be laid off, the realignment or reassignment of employees, and call-back rights are governed by state tenure statutes, local board policies, and/or collective bargaining agreements. RIF employees usually do not have a legitimate claim of entitlement to positions that invokes constitutional due process, but substantive criteria and procedures specified by state law must be followed.

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141. Bolton v. Board of School Comm'rs of Mobile County, 514 So. 2d 820 (Ala. 1987).
142. Hilton v. Pine Bluff Pub. Schools, 748 S.W.2d 648 (Ark. 1988).
143. Ollie v. Highland School Dist. No. 203, 749 P.2d 757 (Wash. Ct. App. 1988).
144. Hachiya v. Board of Educ., Unified School Dist. No. 307, 750 P.2d 383 (Kan. 1988).
145. McSweeney v. Board of Educ. of Johnsburg Cent. School Dist., 525 N.Y.S.2d 956 (App. Div. 1988).
146. Marshall v. Russo, 242 Cal. Rptr. 657 (Ct. App. 1987).
147. Aldridge v. Huntington Local School Dist. Bd. of Educ., 527 N.E.2d 291 (Ohio 1988).
148. Sloan v. Jasper County Community Unit School Dist., 522 N.E.2d 334 (Ill. App. Ct. 1988).
149. State *ex rel.* Schneider v. Board of Educ. of N. Olmsted City School Dist., 530 N.E.2d 206 (Ohio 1988).

Necessity for Reduction-in-force

Two cases revealed that courts do scrutinize carefully the necessity for RIF. In one case, although termination of a special education teacher was not upheld, the court observed that a decrease in funding did not automatically justify a decrease in special education teaching positions, especially in light of the legislature's express intention to protect special education programs.[150] In the other case, a school board decision to reduce a tenured teacher from full-time to half-time was reversed because the evidence at the hearing failed to establish a change in circumstances necessitating a reduction-in-force (i.e., whether the selection was to be on the basis of seniority, participation in other activities, a combination of those considerations, or on some other undisclosed basis).[151]

Elimination of Position

Occasionally litigation concerns the effects of eliminating positions. In one case, a tenured principal, who was transferred to Director of Special Services and Facilities after his principal position had been abolished, was entitled to keep the position of director even though he was the least senior principal.[152] Under the law of another state, an illegally demoted employee could seek damages and reinstatement when his position was eliminated and his employment terminated.[153] In a related case, a school board could not be held in contempt for failing to fill a teaching vacancy as ordered by an arbitrator where the vacancy no longer existed due to declining school enrollment.[154]

Selection of Employees

All of the cases in this area deal with interpretations of state law, and sometimes those interpretations can involve extremely technical aspects. In one state, even a probationary teacher nonrenewed because of budgetary cutbacks was entitled to know upon request the basis for reduction (e.g., diminished enrollment or lack of funds).[155] A number of

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150. Taborn v. Hammonds, 371 S.E.2d 736 (N.C. Ct. App. 1988).

151. Trolson v. Board of Educ. of School Dist. of Blair, 424 N.W.2d 881, 884 (Neb. 1988).

152. Board of Educ. of Pleasantville Union Free School Dist., 522 N.Y.S.2d 830 (Pa. Commw. Ct. 1988).

153. Jost v. Phoenixville Area School Dist., 547 A.2d 830 (Pa. Commw. Ct. 1988).

154. Mahopac Teachers v. Board of Educ. of the Mahopac Cent. School Dist., 533 N.Y.S.2d 520 (App. Div. 1988).

155. Kennedy v. Board of Educ. of School Dist. of Ogallala, Keith County, 430 N.W.2d 49 (Neb. 1988).

cases dealt with the selection of employees to be RIFed and involved a number of unique scenarios: the date certification was received in a supplemental area[156] was the key for seniority purposes; selection within one organizational unit such as an Interdistrict Cooperative unit must be separate from each constituent school district;[157] part-time work of an employee waiting for title I funding did not constitute a break in service reducing his seniority;[158] and, reducing a tenured elementary art teacher who was qualified to teach junior high art, while a nontenured junior high art teacher was retained to teach, diluted tenure rights by affording a nontenured teacher seniority.[159] In one state where RIF selection of employees was to be accomplished according to a statutory point system, an employee selected to be discharged because of teaching deficiencies had to "be retained pursuant to the point system notwithstanding his failure to score well in the area of teacher performance."[160] In one case where selection depended upon application of unpaid absence credit toward seniority, one teacher with 3.085 years seniority was retained over a teacher with 3.081 years.[161] In a selection case unrelated to RIF, selection of an employee to fill a vacated position was set aside where state law required posting all vacancies for at least five working days.[162]

Realignment/Reassignment

Reassignments to new positions will generally be upheld if not arbitrary and capricious and accomplished pursuant to state statute. The choice of the person to fill a vacancy will not be considered arbitrary or capricious if neither the person assigned nor the person complaining was certificated in the area and a late resignation left little time for advertisement.[163] In one case, reassignment of a nontenured teacher from a classroom music teacher to a permanent substitute did not violate the tenure and dismissal act[164] while in two other cases reassigned or reclassified school personnel were entitled under state law to advance reasons for the decisions.[165] In yet another case, reassignment of a

156. Jarrett v. Wattsburg Area School Dist., 533 A.2d 1008 (Pa. 1987).
157. Mohn v. Independent School Dist. No. 697, 416 N.W.2d 494 (Minn. Ct. App. 1987).
158. School Dist. of Duquesne v. Sturm, 547 A.2d 891 (Pa. Commw. Ct. 1988).
159. Bednar v. Westwood Bd. of Educ., 534 A.2d 93 (N.J. Super. Ct. App. Div. 1987).
160. Murray v. Altheimer-Sherrill Pub. Schools, 743 S.W.2d 789 (Ark. 1988).
161. Cohen v. Emerson Bd. of Educ., 542 A.2d 489 (N.J. Super. Ct. App. Div. 1988).
162. Marion County Bd. of Educ. v. Bonfantino, 366 S.E.2d 650 (W. Va. 1988).
163. State v. Bledsoe County Bd. of Educ., 751 S.W.2d 819 (Tenn. 1988).
164. Christie v. San Miguel County School Dist., 759 P.2d 779 (Colo. Ct. App. 1988).
165. State v. Raleigh County Bd. of Educ., 367 S.E.2d 223 (W. Va. 1988); Kelly v. Board of Educ. of Chicago, 527 N.E.2d 510 (Ill. App. Ct. 1988).

full-time tenured teacher to a part-time position meant she had to be paid proportionate to the union contract because under state law a reduction in compensation for tenured teachers could not occur except for inefficiency, incapacity, or unbecoming conduct.[166] An administrator who was reassigned to teaching because of incompetency was entitled to a statutory evaluation of her competency since none of the thirty reasons for transfer dealt with incompetency.[167] In this particular case the teacher was not entitled to be reinstated but she was entitled to be compensated for diminution in salary as a result of the transfer. Numerous school board reassignments were upheld where a principal could be reassigned to classroom teaching without an evaluation prior to assignment;[168] five teachers' seniority rights in existing schools did not entitle them to priority in assignment to a new program;[169] and a furloughed industrial arts teacher could not require reassignment of other industrial arts teachers with more seniority to teach other courses where none of those teachers had majors in any field other than industrial arts.[170]

Call Back Rights

Call back rights generally seem to be controlled by a collective bargaining agreement. Thus, a union contract RIF list making a teacher eligible for the first vacant position for which she is qualified must be complied with.[171] Failure to reinstate a teacher to the first vacant position can result in a damages award equal to the pay the teacher would have received from the date of reinstatement and would continue until she is reinstated.[172] In cases involving special call-back problems, a teacher can be given additional experience credit prior to being excessed so she would have more years of seniority for call-back purposes;[173] offering a tenured teacher on a call-back list a substitute teaching assignment was not the next "vacancy" pursuant to the requirement of the state statute;[174] and a teacher on a RIF list who

166. Bassett v. Board of Educ. of the Borough of Oakland, 538 A.2d 395 (N.J. Super. Ct. App. Div. 1988).

167. Hahn v. Alvord Unified School Dist., 252 Cal. Rptr. 471 (Ct. App. 1988).

168. Quirk v. Board of Educ. of Moorpark Unified School Dist., 244 Cal. Rptr. 924 (Ct. App. 1988).

169. School Comm. of Boston v. Boston Teachers Union, 514 N.E.2d 678 (Mass. App. Ct. 1987).

170. *In re* Nelson, 416 N.W.2d 848 (Minn. Ct. App. 1987).

171. Sherman v. School Comm. of Whitman, 522 N.E.2d 433 (Mass. Ct. App. 1988).

172. Kohler v. Board of Educ., S. Huntington Union Free School Dist., 530 N.Y.S.2d 844 (App. Div. 1988).

173. Mahony v. Mahopac Cent. School Dist., 532 N.Y.S.2d 390 (App. Div. 1988).

174. Gladding v. Board of Educ. of Kings Park Cent. School Dist., 523 N.Y.S.2d 877 (App. Div. 1988).

acquires a new certification while on the list has the right to fill the first vacancy in that new area of certification.[175]

CONTRACT DISPUTES

Board Policies and Contract Stipulations

The nature of a school employees contract and differing interpretations of the provisions in that contract tend to foster litigation. Litigation frequently involves contract silence or contract ambiguity. A collective bargaining contract provision stating that teachers wishing salary increments for taking courses must first consult with the superintendent was held to grant no authority for the superintendent to approve or disapprove the courses taken.[176] Part-time teachers' salary could be set at 1/2 the contract salary step by the school board when the contract was silent regarding part-time teachers' pay.[177] Teachers could not have their pay docked for failure to attend a parent-teacher's conference when the teachers were not compensated for their attendance and the contract was silent regarding possible sanctions for failure to attend.[178] A teacher had a cause of action to determine whether the amount of union agency fees to be paid under the union contract by nonunion teachers was only the $17 local fee or also the $200 state and national fee.[179] In a slightly different case, a school secretary won reinstatement where a principal's personal notes were "personal records" within the meaning of the collective bargaining agreement and were in violation of that agreement.[180]

A contract can both limit and permit school board action. Two human relations positions to be filled under court-ordered desegregation were not subject to arbitration under a collective bargaining contract as to whether the positions must be awarded to those with more seniority.[181] A school board which had adopted certain nonracial objective criteria concerning filling vacant positions must follow those criteria[182] and contract provisions must be followed regarding documentation proce-

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175. Whitley v. Canton City School Dist. Bd. of Educ., 528 N.E.2d 167 (Ohio 1988).

176. Board of Educ. of Mt. Sinai Union Free School Dist. v. Mt. Sinai Teachers' Ass'n, 527 N.Y.S.2d 484 (App. Div. 1988).

177. Beeson v. Wyndmere Pub. School Dist. No. 42, 427 N.W.2d 346 (N.D. 1988).

178. Wilkes-Barre Area Educ. Ass'n v. Wilkes-Barre Area School Dist., 538 A.2d 81 (Pa. Commw. Ct. 1988).

179. Whittier Regional School Comm. v. Labor Relations Comm'n, 517 N.E.2d 840 (Mass. 1988).

180. Oregon School Employees Ass'n v. Lake County School Dist., 763 P.2d 160 (Or. Ct. App. 1988).

181. Board of Educ., Yonkers City School Dist. v. Yonkers Fed'n of Teachers, 533 N.Y.S.2d 761 (App. Div. 1988).

182. Purnell v. Covington County Bd. of Educ., 519 So. 2d 560 (Ala. Civ. App. 1987).

dures prior to dismissing an employee for habitual tardiness.[183] Where a collective bargaining contract had two provisions, "inefficient and incompetent service" requiring sixty days to remedy deficiencies and "conduct seriously prejudicial" permitting immediate suspension with pay, a court is bound by a school board's definition of "conduct" to include five fights which occurred in a teacher's classroom during one classroom morning.[184] On the other hand, a superintendent's three-year contract which contained a salary figure for only the first year was void as to the last two years.[185] A nontenured teacher with five satisfactory evaluations in two years could be nonrenewed at the end of the second probationary year of teaching without first having to be accorded a plan of assistance provided in the contract for those teachers receiving unsatisfactory evaluations.[186] A tenured teacher's resignation did not require school board acceptance to become effective where the school district's policy manual provided that the superintendent could waive the thirty day notice of resignation requirement when a satisfactory replacement was found.[187] A board of education rule prohibiting an employee in the district from supervising a "near relative" was not enforced arbitrarily or capriciously when the wife of an assistant principal teaching in his school was assigned to another school in the district.[188]

Three cases involved school board decisions and pension rights. Teachers in one case were able to recover pension benefits plus interest based on a school board Supplementary Retirement Plan.[189] Eligibility for retirement benefits under board-approved early retirement is the date the approval notification is mailed for purposes of calculating the thirty day conversion period.[190] In the third case, a $14,000 lump sum paid by a school board as a retroactive salary increase in exchange for waiver of all other claims and rights including unused vacation and sick leave may have been compensation for services actually rendered, thus entitling the teacher to pension credit.[191]

Administrative Regulations and Statutory Provisions

School board actions have implicated a wide variety of state or

183. Oregon School Employees Ass'n v. Rainier School Dist., 754 P.2d 9 (Or. Ct. App. 1988).
184. Whitfield v. Little Rock Pub. Schools, 756 S.W.2d 125 (Ark. Ct. App. 1988).
185. Klotz v. Savannah R-III School Dist., 747 S.W.2d 708 (Mo. Ct. App. 1988).
186. Miller v. Board of Educ., Unified School Dist. No. 470, 752 P.2d 113 (Kan. 1988).
187. Sinkevich v. School Comm. of Raynham, 530 N.E.2d 173 (Mass. 1988).
188. Solomon v. Quinones, 531 N.Y.S.2d 349 (App. Div. 1988).
189. Hewel v. Board of Educ. of City School Dist., 527 N.Y.S.2d 493 (App. Div. 1988).
190. McKenna v. Prudential Ins. Co. of Am., 539 A.2d 1266 (N.J. Super. Ct. 1988).
191. Norris v. State Teachers Retirement Sys. of Ohio, 520 N.E.2d 5 (Ohio Ct. App. 1988).

federal statutes. Two cases involved teachers reinstated after military service. In one case a teacher who had been accorded full seniority upon reinstatement also had to be afforded salary placement[192] while in another case reinstated teachers were entitled to full seniority but not to retirement credits toward their pensions.[193]

State statutes frequently place limitations on the manner in which school boards can interpret contracts. In Texas, twenty contract days paid by local funding beyond the 183 could be paid only according to the state tenure statute.[194] A teacher whose disability application had been approved by the school board could not be required to immediately take disability retirement but was permitted the option under state statute to first exhaust his accrued unused sick leave, thus continuing to receive his regular salary.[195] School custodians with a fifty-two week work contract of employment were entitled to recover unemployment compensation for the week between Christmas and New Year's Day when they were laid off during that week by the school district.[196] A school district, which hired several teachers and awarded them more than the five years experience credit permitted by state statute, was required to award credit for all prior teaching experience to every teacher hired that year, as opposed to simply giving those teachers back pay for that one year.[197] A school board's effort to reclassify three months of a substitute teachers service so as to deprive her of statutory reemployment rights for the following year was held to be a subterfuge in violation of a state statute concerning substitute teachers.[198] Under a state statute prohibiting public officers from having any direct interest in any contract, teaching contracts entered into between the school board and spouses of board members were null and void.[199] However, the board members did not have to make restitution for compensation received by spouses because the taxpayers received full value for the services and the board members acted in good faith.

In two peripheral cases, a state statute prohibiting a certificated teacher from serving on the board of education did not apply to the

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192. Lang v. Great Falls School Dist. No. 1, 842 F.2d 1046 (9th Cir. 1988).

193. Rhode Island Fed'n of Teachers v. Employees Retirement Sys., 542 A.2d 249 (R.I. 1988).

194. James v. Hitchcock Indep. School Dist., 742 S.W.2d 701, 706 (Tex. Civ. App. 1987).

195. State *ex rel.* Runyan v. Henry, 516 N.E.2d 231 (Mich. Ct. App. 1988).

196. Billups v. Howell Pub. Schools, 423 N.W.2d 231 (Mich. Ct. App. 1988).

197. United Teachers of Ukiah v. Board of Educ., Ukiah Unified School Dist., 251 Cal. Rptr. 499 (Ct. App. 1988).

198. Eureka Teacher's Ass'n v. Board of Educ. of the Eureka City Schools, 247 Cal. Rptr. 790 (Ct. App. 1988).

199. Smith v. Dorsey, 530 So. 2d 5 (Miss. 1988).

Board of Estimate[200] and statutorily mandated contributions to the Minnesota Teachers Retirement Association were property of a teacher's estate which could be reached by creditors in a bankruptcy proceeding.[201]

TENURE

"Tenure" is a statutory right to continuing contract status which also entitles tenured employees to procedural due process protection and to termination "for cause." Certificated personnel such as teachers and principals can acquire tenure in most states and noncertificated personnel can acquire tenure in some states.

Some states permit teacher or administrative tenure to attach if a person moves vertically from one category to another, but in other states a probationary period must be served after any change in certificated category. It is more likely that certificated administrators will already be certificated teachers for purposes of vertical movement than vice versa. Tenure transfer from one district to another in the state is controlled by state law.

Tenure Status

Tenure is normally acquired at the elementary or secondary level by being offered a contract for the year beyond the statutory number of probationary years. In one case, a teacher who had received notice of dismissal during the second of two year probationary period not only did not acquire tenure, but found that her section 1983 claim was consequently adversely affected.[202]

The kind of contract offered may affect tenure status. In two separate cases, teacher service under a substitute contract,[203] and even a part-time contract, were credited toward tenure.[204] However, in another state two years teaching service under a full-time substitute contract did not count toward the three year probationary period.[205] In a slightly different vein, a school psychologist and a social worker who had served in those nonteaching functions for three and seven years respectively had not satisfied the two year probationary period to qualify for a teaching certificate.[206] Similarly, tenured teachers who

200. Schulman v. O'Reilly-Lando, 545 A.2d 241 (N.J. Super. Ct. App. Div. 1988).
201. *In re* Swanson, 79 B.R. 422 (D. Minn. 1987).
202. Dunlop v. Colgan, 687 F. Supp. 406 (N.D. Ill. 1988).
203. Hawkins v. Ohio County Bd. of Educ., 369 S.E.2d 224 (W. Va. 1988).
204. Williams v. Board of Educ. of Hardin County Community Unit School Dist. No. 1, 520 N.E.2d 603 (Ill. App. Ct. 1988).
205. Burns v. State, 529 So. 2d 398 (La. Ct. App. 1988).
206. Oates-Ulrich v. Okemos Bd. of Educ., 415 N.W.2d 213 (Mich. Ct. App. 1987).

were also employed as school bus drivers could not acquire tenure as bus operators and were therefore not entitled to protection under the bus operator tenure law.[207]

Tenure can even bridge a period of time when a teacher has apparently been laid off. A tenured teacher, laid off in 1984 and rehired in 1985 as a nontenured teacher, but who had won through grievance procedure reinstatement of sick leave and seniority for 1984-85 was held to have retained tenure during the lay-off.[208]

Transfer of tenure can arise at two dimensions: transfer of a teacher from one existing district to another; and transfer of a teacher from an existing district to a newly created district. In the former situation, a tenured teacher in New York was required to serve a two year probationary period after transferring to another district.[209] In the latter situation, a teacher in districts divided to include the old and a new school district had to be accorded tenure status in the new district, apparently because the governing board of the new district had stated in a resolution that it would recognize the tenure status of teachers in the old district.[210]

Tenure of Default or Acquiescence

Tenure by default or acquiescence can arise when a teacher seeks to take advantage of a school district's error or oversight. In one of only two cases in this area, a science teacher, who eventually won his lawsuit against the school district for failing to reemploy him as a probationary teacher, was awarded not only damages but also seniority and tenure on the theory that the length of the appeal exceeded the probationary period. In reversing the award of tenure the state supreme court observed that "[s]uch an award deprives [the school district] of an opportunity to fulfill its duty to review the services of probationary teachers to assure that they are satisfactory."[211] However, in the second case, a biology teacher, who had completed three years of per-diem substitute service and one year of full-time probationary service and who had been granted tenure on the mistaken belief that the per-diem teaching was to be credited toward tenure, could be removed only by following the tenure statute procedures.[212]

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207. Thorne v. Monroe City School Bd., 531 So. 2d 567 (La. Ct. App. 1988).

208. Beck v. Cascade County School Dist. No. 1, 760 P.2d 83 (Mont. 1988).

209. Carpenter v. Board of Educ. of Locust Valley Cent. School Dist., 527 N.Y.S.2d 733 (App. Div. 1988).

210. Britt v. Red Mesa Unified School Dist. No. 27, 748 P.2d 202 (Ariz. 1987).

211. Roek v. Chippewa Valley Bd. of Educ., 422 N.W.2d 680, 683 (Mich. 1988).

212. Saul v. Board of Educ. of City School Dist. of N.Y., 526 N.Y.S.2d 528 (App. Div. 1988).

CERTIFICATION

Certification Standards

Agencies awarding certification are responsible for creating and enforcing regulations for those seeking certificates. Denial of a temporary per-diem teaching certificate for the city of New York was upheld on the basis of the applicant's "unsatisfactory physical and medical examination."[213] A teacher holding a New York City substitute teacher's license in early childhood claimed she was arbitrarily denied a regular teacher's license for grades two-to-six under a criterion conditioning an elementary teacher's license on "possession of a New York City license for any area of service;" however, a court upheld the certificate denial because the word "license" applies to a regular, not a substitute, position.[214]

Licensing agencies' discretion, however, does not extend to automatic exclusion. A bus driver whose visual acuity did not meet the state's vision standards, but who had driven a bus for twelve years, was entitled to have her certification reconsidered in light of her physician's testimony regarding her ability to compensate for her deficiency and in light of her good driving record.[215]

In a related set of facts, a physical education teacher who had moved from Ohio to Pennsylvania to teach stated a cause of action for detrimental reliance against the school district. The district had allegedly told the teacher that he was qualified for the position and that the district would file the application for certification, but the teacher found out after it was too late to enroll for additional college credits that he not only needed additional credits for state certification but he had to take unrequested leave of absence without pay and benefits.[216]

Decertification, Revocation, or Suspension

Certification agencies have broad, but not unlimited, discretion in penalizing persons holding certificates. A five-year teaching certificate revocation was permitted to stand because of substantial supporting evidence even though the decision referred to a memorandum regarding drug allegations which was outside the record.[217] A teacher who pled guilty to making sexual, harassing phone calls to two female students

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213. Lipsman v. New York City Bd. of Educ., 520 N.Y.S.2d 190, 191 (App. Div. 1987).
214. Karp v. Board of Examiners of N.Y. City Bd. of Educ., 523 N.Y.S.2d 1015, 1017 (App. Div. 1988).
215. California School Employees Ass'n v. California Dep't of Motor Vehicles, 250 Cal. Rptr. 50 (Ct. App. 1988).
216. Travers v. Cameron County School Dist., 544 A.2d 547 (Pa. Commw. Ct. 1988).
217. Decola v. Castor, 519 So. 2d 709 (Fla. Dist. Ct. App. 1988).

and who had his teaching certificate suspended by a regional superintendent could have his certificate later revoked by the state superintendent for the same acts of misconduct.[218] However, in another case, changing a hearing examiner's penalty of a three-year suspension to a three-year revocation was too severe a penalty when the teacher had only one year in fourteen with an overall unacceptable evaluation.[219] A department of transportation's recall of a school bus driver's license because she had suffered a heart attack was not supportive of the charge of incompetency where the driver had periodic stress tests and her doctor testified that she had a lower risk of another heart attack than another person not so tested.[220]

In a military decertification case, a NJROTC instructor who was decertified by the naval officer supervising him, and who was thus terminated by the school as not having the requisite certification to teach, did not have a cause of action against the person who decertified him. The state civilian court reasoned that it could not second-guess military decisions about a "decertification [that] arose out of or was in the course of activity incident to service."[221]

218. Trigg v. Sanders, 515 N.E.2d 1367 (Ill. App. Ct. 1987).
219. Walker v. Turlington, 516 So. 2d 1123 (Fla. Dist. Ct. App. 1987).
220. Appeal of Stober, 546 A.2d 155 (Pa. Commw. Ct. 1988).
221. Norris v. Lehman, 845 F.2d 283, 287 (11th Cir. 1988).

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BARGAINING

Stephen B. Thomas

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INTRODUCTION

The amount of collective bargaining litigation remained high in 1988; however, there were no United States Supreme Court cases concerning collective bargaining in education, nor were there any new trends or developments. Notwithstanding the aforementioned, there were numerous related cases with unique factual situations. Cases involving K-12 are presented in this chapter; cases involving higher education are reviewed in Chapter 8.

CONSTITUTIONAL ISSUES

In 1988, two federal and four state cases dealt at least in part with constitutional claims. The Sixth Circuit Court of Appeals reviewed a complaint by nonunion teachers challenging the constitutionality of a union's agency fee collection procedure.[1] The district court, noting that it was likely that the procedures would be found unconstitutional, held that it would enjoin the collection of funds unless the board created an escrow account for placement of the fees, which it did. The plaintiffs then challenged the use of that account. The appeals court held that when the lower court permitted the use of the escrow account it abused its authority.

A second federal case emanated from South Carolina where the state education association challenged state legislation denying payroll deduction benefits to the association, although such benefits were provided at least one other similar organization.[2] The district court reasoned that the case primarily dealt with the right of the government to withhold a benefit (i.e., payroll deduction) on the basis of the political viewpoint of the potential beneficiary. The court found the practice to be inherently suspect and referenced *West Virginia State Board of Education v. Barnette* where the Supreme Court observed that, "[i]f there is any fixed star in our constitutional constellation it is that no official, high or low, can proscribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein."[3] Given the aforementioned, the court held that the state had violated the first and fourteenth amendments when it denied payroll deductions for the plaintiff, while allowing the deductions for a similar, less controversial, association. The state was unable to show a compelling interest as required by the court under strict scrutiny.

In Indiana, a state court of appeals reviewed an action by a teachers'

1. Lowary v. Lexington Local Bd. of Educ., 854 F.2d 131 (6th Cir. 1988).
2. South Carolina Educ. Ass'n v. Campbell, 697 F. Supp. 908 (D.S.C. 1988).
3. 319 U.S. 624, 642 (1943).

union to require the payment of fair share assessments by nonmembers.[4] The nonmembers counterclaimed that the rebate schemes ancillary to the fair share assessment violated their first amendment, freedom of association rights. That scheme required nonmembers initially to pay the same amount as was paid by members. Funds were spent on collective bargaining, contract administration, and political and ideological activities. If a nonmember objected to the political and ideological activities that person could request a rebate of that portion of the fee allocated to the objectionable functions. However, this procedure allowed the union to retain, at least temporarily, funds not associated with negotiations and contract administration. In reaching its conclusion the court reviewed *Chicago Teachers Union v. Hudson*.[5] In that 1986 case, the Supreme Court found a rebate plan similar to the one in the present case to violate the first amendment. Justice Stevens, writing for the majority, noted that,

> [a] remedy which merely offers dissenters the possibility of a rebate does not avoid the risk that dissenters' funds may be used temporarily for an improper purpose. The Union should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining.[6]

Given the aforementioned, the state appeals court (Fourth District) held that the present rebate scheme also violated the first amendment.

In a second, almost identical, Indiana case in the Third District, the union charged that nonmember teachers had failed to pay representation fees.[7] The teachers counterclaimed that the association violated their constitutional rights by collecting fees for purposes unrelated to collective bargaining. The Third District Court of Appeals held for the teachers claiming that the rebate scheme was constitutionally inadequate and that the Indiana Education Employment Relations Board must resolve the dispute over the amount of the representation fee.

The final fee case of 1988 claimed a violation of both constitutional and civil rights. In that case, the Ohio Supreme Court was confronted with a complaint by nonmember teachers alleging that their payment of service fees violated their rights.[8] The lower courts had found the union's rebate procedures to be "constitutionally inadequate," and had enjoined the union from collecting fees from the plaintiffs. That decision was

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4. Cheeseman v. Jay School Corp. Classroom Teachers Ass'n, 527 N.E.2d 715 (Ind. Ct. App. 1988).
5. 106 S. Ct. 1066 (1986).
6. *Id.* at 1075.
7. Fort Wayne Educ. Ass'n, Inc. v. Aldrich, 527 N.E.2d 201 (Ind. Ct. App. 1988).
8. Gibney v. Toledo Bd. of Educ., 532 N.E.2d 1300 (Ohio 1988).

affirmed on appeal to the state high court where it was concluded that the teachers could not be required to pay fees until the union had established a constitutional method to rebate that portion of the fees that could not be retained under existing laws.

The final constitutional case of 1988 dealt with (1) a refusal of a corporation to release insurance rating information to school districts and (2) related administrative proceedings commenced by the Commissioner of Insurance.[9] A nonprofit voluntary employee's beneficiary association provided insurance to member districts (i.e., a form of "insurance pooling"). Selected members had requested to review claims and ratings to determine if pooling was beneficial or if a separate district policy might be more cost efficient. The corporation refused to provide the information for fear that the districts with the best claims-to-premium ratio might choose to withdraw from the group. Such a practice was viewed by the Commissioner of Insurance as violating state law. The corporation claimed as its defense that the controversial statute was unenforceable since it was contrary to provisions of the state constitution. The Michigan Court of Appeals held that statutes are presumed to be constitutional, unless their unconstitutionality is clearly apparent, and that the intent of the extant law had not been impermissibly altered. The court noted that the statute was not limited in application to workers' compensation insurance and that the statute did not violate the "change of purpose" clause of the state constitution.

Recognition and Representation Issues

Unit Determination

This section includes six cases: one dealing with chairpersons, one involving athletic directors and coaches, two involving substitute teachers, and two filed by nonprofessional employees.

Supervisory, Managerial, and Confidential Employees. In New York State, the Public Employment Relations Board (PERB) denied a school district's application for certification of a separate bargaining unit for seventeen teachers who were designated as chairpersons.[10] On review, the court found the decision to be arbitrary and capricious. On two previous occasions, PERB had allowed the splintering of the bargaining unit under similar circumstances. In the present case, PERB failed to explain why it chose not to follow established

9. Michigan Educ. Special Servs. Ass'n v. Commissioner of Ins., 425 N.W.2d 157 (Mich. Ct. App. 1988).

10. Uniondale Union Free School Dist. v. Newman, 528 N.Y.S.2d 655 (App. Div. 1988).

precedent. Accordingly, the Supreme Court, Appellate Division held that PERB's failure to explain its inconsistent determinations mandated that the instant determination be annulled.

A teachers' association and school board in Indiana entered into a collective bargaining agreement in September of 1985.[11] One month later the board petitioned to exclude the positions of assistant athletic director, head high school boy's basketball coach, and head high school football coach from the teacher's bargaining unit. The state employment relations board determined that the three positions were supervisory and should be excluded from the bargaining unit. The teachers' association filed a petition for judicial review. The state court of appeals held that the board acted within its statutory jurisdiction.

An employer in Ohio appealed an order from the state Employment Relations Board (ERB) certifying a teachers' union as the exclusive bargaining unit of its employees.[12] A court of common pleas dismissed and appeal was made. The court of appeals reversed, and the Ohio Supreme Court affirmed. The state high court held that the board's adjudications were subject to review, including the certification order and the determination of who may vote in the rerun election.

Substitute, Part-time, and Nonprofessional Employees. A social services union in California filed a representation petition with the NLRB to obtain an election to determine whether it could represent two units within a private, religious school: Unit A consisted of all full-time and regular part-time child-care workers, recreation assistants, cooks, cook helpers, and maintenance employees; Unit B consisted of all office clerical employees.[13] The private school challenged the NLRB's jurisdiction on the ground that it was a church-operated school and therefore exempt from the NLRA under the Supreme Court's decision in *NLRB v. Catholic Bishop of Chicago*.[14] The NLRB disagreed with the school's counterclaim and concluded that the employees were not involved with the religious mission of the institution. Following a series of related appeals the Ninth Circuit eventually held for the union.

In Illinois, a vocational education authority challenged the decision of the Educational Labor Relations Board (ELRB) to approve an election in which nonprofessional employees were added to the professional employees bargaining unit.[15] The groups had been com-

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11. Board of School Trustees of the Marion Community Schools v. Marion Teachers' Ass'n, 530 N.E.2d 309 (Ind. Ct. App. 1988).

12. South Community, Inc. v. State Employment Relations Bd., 527 N.E.2d 864 (Ohio 1988).

13. Hanna Boys Center v. Miller, 853 F.2d 682 (9th Cir. 1988).

14. 440 U.S. 490 (1979).

15. Dupage Area Vocational Educ. Auth. v. State Educ. Labor Relations Bd., 522 N.E.2d 292 (Ill. App. Ct. 1988).

bined in spite of the fact that the professional employees had not voted to determine whether they wished to have the nonprofessional employees included in the bargaining unit. As a result, the court ordered the certification of the unit to be vacated and remanded the cause for a separate vote by the preexisting group of professional employees.

Substitute teachers in Michigan sought to become part of the same bargaining unit as regular, full-time teachers.[16] The local board of education challenged the decision of the state Employment Relations Commission to allow the accretion of substitute teachers. The state appeals court upheld the commission's decision noting that although substitutes did not work the same number of hours as regular teachers, they were expected to perform essentially the same jobs and to be "professional in every manner."[17]

There was a similar case in Iowa, where a local education association petitioned the PERB to amend its collective bargaining unit to add substitute teachers.[18] The board ruled that substitute teachers performing service each of four consecutive months qualified as public employees covered by the Public Employment Relations Act and therefore were entitled to the benefits of collective bargaining. That decision was upheld on appeal by the Supreme Court of Iowa.

Rights and Obligations of Exclusive Bargaining Representatives

Cases in this section deal with union rights and obligations: four cases dealt with rights (fee assessment), two cases dealt with obligations.

Union Rights

Employees of a local board brought suit in the District of Columbia claiming that the board had unlawfully withheld union dues from their wages after expiration of the collective bargaining agreement.[19] The court held that the plaintiffs had failed to exhaust their administrative remedies and that the PERB had the primary jurisdiction to decide whether the conduct represented an unfair labor practice.

In another fee-related case, the Supreme Court of Vermont held that an agency fee agreement violated the state Labor Relations for Teachers

16. Taylor Fed'n of Teachers, MFT, AFT, AFL-CIO v. Taylor Bd. of Educ., 423 N.W.2d 44 (Mich. Ct. App. 1988).

17. *Id.* at 48.

18. Dubuque Community School Dist. v. Public Employment Relations Bd., 424 N.W.2d 427 (Iowa 1988).

19. Hawkins v. Hall, 537 A.2d 571 (D.C. 1988).

Act and that the subsequent inclusion of teachers in the Municipal Labor Relations Act did not repeal the agency fee prohibition.[20]

In Connecticut, the state supreme court was asked to determine the legality of a "fair share" service fee assessed nonmembers.[21] The fee reflected the costs of collective bargaining, contract administration, and grievance adjustments. The court upheld the fee and noted that employees who reap the benefits of an exclusive representative's collective bargaining efforts may be required to pay their fair share of related costs.

The Massachusetts Labor Relations Commission ordered a school committee to enforce the agency service fee clause of the collective bargaining agreement by terminating the employment of a teacher who refused to pay that fee.[22] The Supreme Judicial Court of Massachusetts held that the commission had the jurisdiction to discharge the teacher; that the failure to discharge was a prohibited practice; and that the teacher had been given adequate notice.

Obligations of Exclusive Representatives

Plaintiff in a Michigan case claimed that she was wrongfully laid off by the school district and that the teachers' union failed to properly represent her.[23] She claimed that the contract agreed to by the union had been altered with consent of the membership. Specifically, she complained about the change of date required for notification when a teacher is to be laid off. The state court of appeals affirmed the lower court decision that the six-month statute of limitations found in the Public Employment Relations Act applied to the teacher's claim and that time had expired.

In the final case in this section, the Minnesota Court of Appeals heard a case where a former school district secretary brought action (1) against the district seeking reinstatement following a requested personal leave and (2) against the union for failing to provide her with fair representation.[24] In a fairly complex case, involving two negotiated agreements, several "verbal understandings," and a rescinded school board vote, the plaintiff was denied reassignment to her former position following a leave of absence where she wanted to "try out a new job." The appeals court determined that the agreement between the secretary

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20. Weissenstein v. Burlington Bd. of School Comm'rs, 543 A.2d 691 (Vt. 1988).
21. Kilpatrick v. Board of Educ. of Fairfield, 535 A.2d 1311 (Conn. 1988).
22. Whittier Regional School Comm. v. Labor Relations Comm'n, 517 N.E.2d 840 (Mass. 1988).
23. Leider v. Fitzgerald Educ. Ass'n, 421 N.W.2d 635 (Mich. Ct. App. 1988).
24. Whipple v. Independent School Dist. No. 621, 424 N.W.2d 559 (Minn. Ct. App. 1988).

and the district whereby the secretary would be granted leave but would retain her seniority rights was not an unfair labor practice. However, the court ruled that the employee was not entitled to reinstatement and that the evidence sustained the finding that the union had not violated its duty of fair representation. [For additional cases dealing with dismissal, nonrenewal, reduction-in-force, layoff, and demotions, see subsection under "Judicial Review."]

SCOPE OF BARGAINING

This section includes cases that deal primarily with the scope of bargaining: mandatory, permissive, and prohibited. Nine related cases were decided in 1988—five involved mandatory topics and four involved prohibited topics.

Mandatory Topics of Bargaining

Of the five cases included in this subsection two were decided by federal circuit courts and three were ruled on by state appeals courts. In the first case, the District of Columbia Circuit Court of Appeals reviewed an appeal of the Overseas Education Association.[25] In that case, the Department of Defense Dependence Schools (DODDS) claimed that a proposal from the bargaining unit relating to travel and educational benefits for unit members upon retirement or departure from DODDS was not a required subject of bargaining. The Federal Labor Relations Authority agreed that the proposal was not within the employer's duty to bargain and the association petitioned for review. The court of appeals denied the petition and reasoned that the request failed to satisfy the threshold negotiability criterion of affecting working conditions.

The Eleventh Circuit was asked to review an order issued by the Federal Labor Relations Authority (FLRA) requiring the United States Army to negotiate selected items with the union representing employees of the school serving army personnel dependents.[26] The union had submitted three proposals to the Army during the course of negotiations: the first involved mileage reimbursement, insurance, and salary schedules; the second proposed a fixed salary increase of 13.5%; the third included personal leave, sick leave, professional leave, maternity leave, and leave without pay. The Army refused to negotiate, contending that none of the proposals was a mandatory subject of negotiation. The

25. Overseas Educ. Ass'n, Inc. v. Federal Labor Relations Auth., 858 F.2d 769 (D.C. Cir. 1988).

26. Fort Stewart Schools v. Federal Labor Relations Auth., 860 F.2d 396 (11th Cir. 1988).

27. Northwestern School Corp. of Henry County Bd. of School Trustees v. Indiana Educ. Employment Relations Bd., 529 N.E.2d 847 (Ind. Ct. App. 1988).

FLRA disagreed with the Army and concluded that each item was in fact a condition of employment and therefore a mandatory item in negotiations. On appeal, the Eleventh Circuit affirmed the FLRA decision.

In Indiana, a lower court ruling that the board had committed an unfair labor practice was appealed.[27] The board had refused to bargain school calendar items with the teachers' labor union resulting in the filing of a complaint with the Indiana Education Employment Relations Board (IEERB). The IEERB hearing officer noted that the 1972-73 agreement between the union and school district included the establishment of a school calendar among its negotiable items. The hearing officer then concluded that selected items within the school calendar remained mandatory in 1983. The appeals court held that although the school calendar is not a proper subject of negotiations, selected items which do not infringe upon a school board's exclusive managerial power remain bargainable under state law.

The state legislature in New York enacted the Excellence in Teaching apportionment program (EIT) whereby local school districts could apply for special funds which could be used to supplement the salaries of eligible teachers. A local board voted not to apply for the funds because it would be responsible for paying approximately $100,000 in increased Social Security taxes, retirement system assessments, and fringe benefits, and because the existing collective bargaining agreement extended from 1985 to 1990 and was viewed by the board as providing substantial salary increases. The local teachers' union claimed that the decision whether to apply for EIT funds was a mandatory item to be negotiated. When the board refused to negotiate, the union filed an improper practice charge. The Administrative Law Judge concluded that the decision should have been negotiated and the PERB ultimately affirmed that decision. On further appeal, the Supreme Court, Appellate Division reversed, holding that the legislative history of the Act supports the position that districts must negotiate the distribution of EIT funds, but that the Act was silent on the duty to negotiate whether to apply for the funds.[28]

Indiana law prohibits teacher strikes and replaces the strike weapon with a requirement of good faith bargaining with the school employee association's exclusive representative regarding mandatory subjects (e.g., wages, salary, hours). However, although the employer must discuss, it is not required to bargain on certain nonmandatory subjects. If an impasse is declared the Indiana Education Employment Relations Board (IEERB) is required to appoint a mediator; furthermore, if a

28. City School Dist. of Elmira v. New York State Pub. Employment Relations Bd., 536 N.Y.S.2d 214 (App. Div. 1988).

mediator fails to facilitate a solution the IEERB then must initiate fact-finding. The purpose of the latter is to provide a neutral advisory opinion. In 1988, a local school district alleged that the IEERB was involved in illegal fact-finding. A state appeals court disagreed and affirmed the lower court decision that the IEERB may receive evidence over the school employer's objection that the evidence was outside the scope of mandatory subjects of bargaining.[29]

Prohibited Topics of Bargaining

Among the four cases in this subsection, one was decided by a federal circuit court and three were ruled on by state appeals courts. In the first case, the Second Circuit Court of Appeals reviewed a case where a teachers' union challenged a FLRA decision that use of personal service contracts, accommodation of employee preferences in assigning extracurricular duties, and school calendar were not mandatory subjects of bargaining.[30] The Army counterclaimed that it did not have to negotiate with the teachers over salary schedule. The appeals court concluded that the use of personal service contracts was unlawful; that the employee preference proposal did not interfere with the agency's right to assign employees; that the school calendar was not negotiable; and that the negotiation of the salary schedule was mandatory.

The Oregon Employment Relations Board ruled that the school district had failed to bargain in good faith over seniority rights during layoff.[31] The district proponed that the topic was prohibited, given that it is regulated by state statute. The union had proposed a two-track system: one for part-time, another for full-time. Under the plan, a teacher who was hired as part-time and later became full-time could not count part-time employment toward seniority on the full-time scale. Accordingly, a person could teach ten years for the district, five part-time and five full-time, and receive only five years seniority. The state appeals acourt held that the aforementioned proposal would have violated state statute mandating one seniority track for teachers, and thus the proposal was a prohibited subject of bargaining.

In Michigan, a local board of education decided to cease operating a special education center and to transfer related functions and responsibilities to an intermediate school district.[32] The teachers' union claimed an unfair labor practice. The Employer Relations Commission reviewed

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29. Blackford County Schools v. Indiana Educ. Employment Relations Bd., 519 N.E.2d 169 (Ind. Ct. App. 1988).

30. West Point Elementary School Teachers Ass'n v. Federal Labor Relations Auth., 855 F.2d 936 (2d. Cir. 1988).

31. Eugene Educ. Ass'n v. Eugene School Dist., 754 P.2d 580 (Or. Ct. App. 1988).

32. Bay City Educ. Ass'n v. Bay City Pub. Schools, 422 N.W.2d 504 (Mich. 1988).

the situation and concluded that there was no duty to bargain the decision. On appeal, the state supreme court held that the local board's decision was an educational policy decision within its managerial discretion rather than a term and condition of employment subject to a duty to bargain.

The Supreme Court of North Dakota affirmed the dismissal of a lower court of a complaint filed by an education association that the district could not change the number of class periods to be taught in a standard day by full-time teachers without first negotiating in good faith.[33] Prior to the 1987-88 school year, a standard school day consisted of five class periods of fifty-five minutes each, for a total of 275 minutes. If a teacher taught a sixth period, the teacher received additional compensation. Notwithstanding past practice, in April of 1987, the board established a daily teaching schedule of six periods of forty-seven minutes each, for a total of 282 minutes. The high court noted that the negotiated agreement did not spell out the number of class periods in a standard day or require additional compensation for teaching an additional period. Accordingly, the dismissal was upheld.

GRIEVABILITY AND ARBITRABILITY

Cases in this subsection deal primarily with whether a dispute is grievable or arbitrable, who determines if a dispute is grievable or arbitrable, what procedures must be followed, and what acts fall under the umbrella of managerial prerogative. There were seven related cases in these categories in 1988: two under "Presumption and Arbitrability" and five under "Who Determines."

Presumption and Arbitrability

As mentioned above, there were two cases in 1988 that have been included in this subsection: one from Colorado, the other from Illinois. In the Colorado case, a nontenured teacher failed to receive the recommendation of her principal for reappointment.[34] As a result, she tendered six grievances to her principal challenging the content of her evaluations as well as the procedures that were followed during the evaluation process. The union demanded arbitration, but the board claimed that the grievances were not arbitrable. The union dropped the claim, but the teacher filed suit approximately one year later. The trial court denied the requested relief on the grounds that the plaintiff lacked standing to bring the action, and noted that even if she had standing, she was

33. Mandan Educ. Ass'n v. Mandan Pub. School Dist. No. 1, 425 N.W.2d 917 (N.D. 1988).

34. Thomas v. Thompson School Dist. R2-J, 749 P.2d 966 (Colo. Ct. App. 1988).

precluded from acquiring relief by virtue of the doctrine of laches.

A varsity football coach in New York received poor performance evaluations in his capacity as coach and, as a result, was not offered a coaching contract for the next year; his tenured position as a physical education instructor was not affected.[35] The teacher association filed a grievance on his behalf claiming a violation of two portions of the negotiated agreement; one dealt with procedures of evaluation; the other stipulated that a teacher is not to be deprived of a "professional advantage" without just cause. The lower court held for the board and appeal was made by the union. On appeal, the Supreme Court, Appellate Division concluded that the demand for arbitration was sufficiently specific for the lower court to have determined that an arbitrable dispute existed and that although the arbitrator could not order the renewal of the former coach, he still had broad power to fashion other relief. However, the court further noted that the authority to assess qualifications of teachers for appointment to coaching positions was a nondelegable responsibility of the board of education.

Who Determines

Cases from Ohio, Illinois, Pennsylvania, and California are included in this subsection. A limited contract employee of an Ohio school district filed a grievance after she learned that her contract was not to be renewed.[36] The arbitrator held that employees on limited contract were not included within the negotiated agreement. On appeal, the court of common pleas made an independent construction of the agreement and concluded that the issue was arbitrable. The board appealed that decision to the state court of appeals. The intermediate court reversed and proponed that the lower court should not have made an independent determination of arbitrability, but rather should have reviewed the arbitrator's decision under statutory guidelines.

An Illinois school district filed suit questioning the validity of a provision of its collective bargaining agreement.[37] The lower court held for the district and concluded that a portion of the agreement was illegal. The judge then ordered the parties to bargain in good faith regarding promotion, transfer, and job elimination. The union appealed the decision, which was later vacated by the state appellate court. The appellate

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35. Riverhead Cent. School Dist. v. Riverhead Cent. Faculty Ass'n, 528 N.Y.S.2d 611 (App. Div. 1988).

36. Springfield Local Ass'n of Classroom Teachers v. Springfield Local School Dist. Bd. of Educ., 525 N.E.2d 27 (Ohio Ct. App. 1988).

37. Board of Educ., Benton Consol. School Dist. No. 47 v. Benton Fed'n of Teachers, Local No. 1956, 518 N.E.2d 1257 (Ill. App. Ct. 1988).

court reasoned that the circuit court lacked jurisdiction to determine arbitrability of provisions of collective bargaining agreements.

A Pennsylvania teacher was suspended for three days for distributing copies of sexually suggestive material by placing them in school mailboxes.[38] After receiving the penalty, he filed a grievance claiming that the suspension violated the collective bargaining agreement. The district claimed that the grievance was not arbitrable and that disciplinary suspensions were not covered. The arbitrator disagreed on the basis of an implied "just cause" provision. However, the arbitrator further determined that the suspension was justified, but should have been for one day, rather than three. The district appealed to the court of common pleas. That court reversed and held that there was no implied just cause provision in the contract and that the arbitrator lacked the authority to review the claim. That opinion was reversed on further appeal to the commonwealth court, however, where the grievance was found arbitrable as was the reduction in penalty.

A teachers' association in California requested arbitration of a grievance filed by a nonrenewed kindergarten teacher.[39] The local district refused to arbitrate the issue and the association filed suit. The trial court denied the petition and appeal was made. The appeals court affirmed the lower court ruling and noted that it was the court, and not the arbitrator, that must determine whether the issue was arbitrable and that in the present case the teacher's dismissal was not a proper subject of arbitration.

In the final case in this section, the Connecticut Court of Appeals reviewed a case dealing with a state's effort to vacate an arbitrator's decision to uphold a community college employee's grievance concerning her termination.[40] The grievant, a payroll clerk, served nine months as a provisional employee and later, after passing a competitive examination, was appointed as a permanent employee. Less than five months later her employment was terminated. She filed a grievance seeking to determine whether the termination was for just cause. The state contended that the dispute was not subject to arbitration under the collective bargaining agreement. That agreement stipulates that permanent employees may be dismissed within a six month probationary "working test period." An arbitrator determined that the dispute was arbitrable, upheld the grievance, and required the district to reinstate the clerk and provide her with back wages. However, the appellate court held that the arbi-

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38. North East Educ. Ass'n v. North East School Dist., 542 A.2d 1053 (Pa. Commw. Ct. 1988).

39. Fontana Teachers Ass'n v. Fontana Unified School Dist., 247 Cal. Rptr. 761 (Ct. App. 1988).

40. State v. AFSCME, Council 4, 537 A.2d 517 (Conn. App. Ct. 1988).

trator exceeded her authority in that the dispute was not arbitrable. Employment prior to receiving a permanent assignment could not be included in determining whether the employee had completed her six-month probationary period.

JUDICIAL REVIEW

Propriety of Arbitral Awards and Agency Decisions

Decisions of arbitrators and employment relations boards generally are given great deference by the courts. Exceptions to this general practice exist when such decisions are arbitrary, not based on contract, or in conflict with state or federal statute or constitution. Notwithstanding the aforementioned, there were numerous occasions in 1988 when either the district or the union appealed an arbitrator's or an agency's decision. For 1988, those cases can be grouped into nine main categories: salary issues; teaching schedule; supplemental duties; bargaining unit work; use of certified employees; school calendar; annexed and consolidated districts; dismissal, nonrenewal, reduction-in-force, layoff, and demotions; and promotion.

Salary Issues. A three-year collective bargaining agreement in New York provided in pertinent part that all course credits would be accepted for movement on the salary schedule, except in-service credits earned prior to the effective date of the contract. If a teacher wished the credits to count, the teacher must "consult" with the superintendent prior to enrollment. A teacher, following the stipulated procedure, submitted a course review request so that she might count the credit earned in a public relations course. The superintendent refused her request. The teacher filed a grievance claiming that the superintendent did not have the authority to approve or disapprove and that the credits should count. The arbitrator agreed with the plaintiff and appeal was made by the district claiming that the arbitrator had exceeded his authority. The trial court confirmed the arbitrator's decision and dismissed the proceedings on the merits. Further appeal was made to the Supreme Court, Appellate Division where the lower court ruling was affirmed. The appeals court noted that the arbitrator's decision was not irrational, did not exceed a specifically enumerated limitation on his power, and did not violate public policy.[41]

In Florida a teacher alleged that his salary was set too low, arguing that the board had not given adequate credit, as required by the nego-

41. Board of Educ. of Mt. Sinai Union Free School Dist. v. Mt. Sinai Teachers' Ass'n, 527 N.Y.S.2d 484 (App. Div. 1988).

tiated agreement, for his twenty years of military experience.[42] The arbitration panel decided in favor of the board and found that the provision of the contract dealing with military credit was ambiguous and that there was insufficient evidence that the plaintiff received "inequitable experience credit." Judicial review then was sought where the trial judge nullified the arbitration panel's decision and held that the plaintiff could proceed to trial on the merits of his dispute. Petition then was granted by the state court of appeals which held that a trial on the merits was not available to the plaintiff after the parties opted for a nonjudicial forum by agreement. As a result, the lower court order was quashed and the case was remanded.

A California school district presented the local teachers' association with its "last, best, and final" offer, which included employment hours, grievance procedures, fringe benefits, and an 8% salary increase. The association refused to take the offer to the general membership for a secret ballot, although the district had so requested. Because of this refusal, the district decided to bypass the association and distribute the offer directly to the members. Additionally, the district informed the representative of the classified employees that their wages would be adjusted from a 5% increase to an 8% increase, equal to that proposed for the teachers and consistent with an earlier "parity agreement." The teachers' association then filed an unfair practice charge with the PERB claiming that the salary increase for classified employees and the direct offer to faculty violated state law. The PERB dismissed the second charge and later ruled for the district regarding the first. Eventually the issue was before the state supreme court which concluded that the parity agreement did not (1) violate the statutory requirement that classified and certificated employees not be included in the same bargaining unit, and (2) result in a violation of the district's duty to bargain in good faith with its certificated employees.[43]

A local education association in Pennsylvania filed a grievance on behalf of employees who were hired at salaries allegedly below the amount agreed to in contract. In the event of such a disagreement, the contract also required that the dispute be heard by an arbitrator. The arbitrator's decision was to be binding and final. Following a review of the contract and the dispute, the arbitrator ruled in favor of the employees; that decision was appealed to the court of common pleas where it was affirmed. On further appeal to the commonwealth court, the

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42. District School Bd. of St. Johns County v. Timoney, 524 So. 2d 1129 (Fla. Dist. Ct. App. 1988).

43. Banning Teachers Ass'n v. Public Employment Relations Bd., 750 P.2d 313 (Cal. 1988).

decision was again affirmed, and the court concluded that the arbitrator's award drew its essence from the collective bargaining agreement.[44]

The Supreme Court of North Dakota affirmed a lower court decision regarding part-time teachers who had charged that their contracts did not conform with the negotiated master contract. The lower court had ruled that the master contract was ambiguous, but that the district's method of giving one-half salary step under the schedule for each part-time year served was consistent with the contract and not a violation. The state high court concluded that the findings of the lower court were not clearly erroneous.[45]

A federal district court in Illinois was the first court to interpret the enforcement provisions of the Prevailing Wage Act of Illinois. A dispute arose regarding the wages paid employees responsible for asbestos abatement within a school. Such wages were below that stipulated by the Prevailing Wage Act. The court held in favor of the plaintiff and observed that the public contractor's failure to specify the amount of prevailing wages was not fatal to the worker's claim under state law.[46]

Teaching Schedule. In Illinois, a teacher was denied an extended-day schedule, notwithstanding the fact that he had the expertise to teach classes being taught by full-time faculty on overload or by a substitute teacher. The Educational Labor Relations Board, and later an Illinois appellate court, held that the board had engaged in an unfair labor practice.[47]

Supplemental Duties. A classroom teacher in Ohio protested the assignment of "homeroom duties." She had worked in the district for over a decade and had not been assigned such duties previously. As a result, she filed a grievance challenging the assignment and eventually prevailed. However, when she received her annual evaluation, it contained a checkmark on "improvement needed" regarding cooperation with colleagues. She then claimed that the poor evaluation was in retaliation to her earlier grievance. The Ohio Court of Appeals concluded that the poor evaluation was merited because she had not properly performed her homeroom responsibilities, notwithstanding the fact that they had been improperly assigned in the first place.[48]

Teachers in Pennsylvania failed to attend several parent-teacher conferences and had their pay docked accordingly. The collective bar-

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44. West Shore School Dist. v. West Shore Educ. Ass'n, 536 A.2d 483 (Pa. Commw. Ct. 1988).

45. Beeson v. Wyndmere Pub. School Dist. No. 42, 427 N.W.2d 346 (N.D. 1988).

46. Contreras v. Control Resources Corp., 680 F. Supp. 289 (N.D. Ill. 1988).

47. Board of Educ. of Chicago v. Illinois Educ. Labor Relations Bd., 524 N.E.2d 711 (Ill. App. Ct. 1988).

48. Akron Bd. of Educ. v. State Employment Relations Bd., 526 N.E.2d 115 (Ohio Ct. App. 1988).

gaining agreement stipulated that teachers were to attend two parent-teacher conferences and six faculty meetings per school year. The conferences and meetings were considered as part of their normal work day. After having their pay docked for nonattendance, the teachers filed a grievance. The arbitrator determined that attendance was required and that the district had the right to discipline the teachers, but that the district could not dock their pay since that money already had been earned by the teachers. The district appealed. The trial court vacated the award and held that it was not rationally derived from the terms of the collective bargaining agreement. The lower court concluded that failure to attend represented a breach of contract and that the docking of pay was a permissible means of disciplining those teachers who failed to attend. The association appealed to the commonwealth court where the lower court ruling was reversed. The commonwealth court held that the arbitrator's original ruling drew its essence from the agreement.[49]

The collective bargaining agreement entered into by a teachers' union and a New York school district required in pertinent part that:

> Planning-preparation time shall be provided so that teachers may have time during the required work day to engage in such professional responsibilities as grading and correcting papers, planning lessons and tests, and conferring with pupils, parents, and other staff members. This time shall be apart from the time teachers meet their classes or have other scheduled or required duties.

Notwithstanding the aforementioned, the district revived a team-teaching program for two middle schools and required selected teachers to attend planning sessions on a regular daily basis during the planning/preparation period. Following the review of the resulting grievance, the arbitrator ruled in favor of the association and ordered the district to cease and desist from requiring attendance at the meetings. The arbitrator also ordered the district to pay designated amounts to the teachers who already had attended such meetings without compensation. The Supreme Court, Appellate Division, affirmed the award and held that the arbitrator's decision did not violate public policy and was not punitive.[50]

Bargaining Unit Work. This section includes cases from Michigan, Pennsylvania, and Ohio. In the Michigan case, the district employed ten roofers, but later hired private roofing contractors to remove and replace the roofs on several of its buildings. The union then filed a grievance claiming that "normal bargaining unit work" was being con-

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49. Wilkes-Barre Area Educ. Ass'n v. Wilkes-Barre Area School Dist., 538 A.2d 81 (Pa. Commw. Ct. 1988).

50. Trudeau, *In re*, 524 N.Y.S.2d 856 (App. Div. 1988).

tracted out, thereby violating the collective bargaining agreement. The relief sought was the overtime income that the employees would have received had they performed the work. The arbitrator ruled in favor of the union and used a formula based on the difference between the number of hours worked by the private roofers and the number of hours worked by the employees during the same period. The school district appealed to the circuit court to vacate the arbitrator's award. The lower court ruled on behalf of the district and claimed that the arbitrator had exceeded his authority by deciding matters not subject to arbitration and by ruling that the work was a reasonable opportunity for overtime for the employees. The state appeals court affirmed in part the lower court decision and held that although the district waived the issue of arbitrability by voluntarily participating in arbitration, it still could claim that the arbitrator exceeded his authority during those proceedings. Furthermore, the appeals court agreed with the lower court that the arbitrator was incorrect in declaring that roof replacement was normal bargaining unit work. Notwithstanding the above, the appeals court further concluded that the arbitrator could in fact determine that the work was a reasonable opportunity for overtime for union employees.[51]

A Pennsylvania school district decided to close certain of its schools and to send the students to a neighboring school district.[52] The union filed a grievance claiming that the district had violated the bargaining agreement by subcontracting bargaining unit work. The grievance was granted by an arbitrator who ordered the district to rescind its decision to subcontract and to bargain in good faith. Furthermore, the district was mandated to make whole all of the affected teachers. The district petitioned the court of common pleas to vacate, modify, or correct the arbitrator's decision, which it did, except for that portion which required the district to make whole the teachers for the period August 26 to August 31—the days remaining on the collective bargaining agreement. The association appealed this decision to the Commonwealth Court of Pennsylvania. That court affirmed the lower court decision.

Following the retirement of three school nurses and the restructuring of the health services program, only one replacement nurse was hired. In the alternative, two aides were employed to perform selected health services and to do clerical work. These changes were not negotiated with the employee union, but rather were based on the findings of a study prepared for the superintendent. The union claimed that the

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51. Flint School Dist. v. Service Employees Int'l Union, AFL-CIO, 423 N.W.2d 608 (Mich. Ct. App. 1988).

52. Midland Educ. Ass'n, PSSPA/PSEA v. Midland Borough School Dist., 541 A.2d 428 (Pa. Commw. Ct. 1988).

changes resulted in the reassignment of work from bargaining unit members (nurses) to nonbargaining unit members (aides) and thus violated state labor law. The Ohio Supreme Court reversed the appeals court decision, which was in favor of the district, and concluded that the reassignment was a mandatory subject for collective bargaining.[53] The state high court observed that the confusion in the case was due to the General Assembly's use of the term "affect." The controversial portion of statute mandates collective bargaining of decisions that "affect" wages, hours, and other terms and conditions of employment. The word "affect," according to the court, suggests that management rights which act upon or produce a material influence upon working conditions are subject to negotiation.

Use of Certified Employees. Another Pennsylvania case dealt with the decision of an arbitrator that the school district had ignored the bargaining agreement when it hired two noncertificated individuals to fill coaching positions when a certificated person had applied. The Commonwealth Court of Pennsylvania upheld the arbitrator's decision on appeal as being drawn from the essence of the agreement.[54]

School Calendar. In an Illinois case, a local teachers' association filed a charge with the state labor relations board alleging that the district had engaged in an unfair labor practice when it unilaterally changed December 23 from a vacation day to a pupil attendance day without first submitting the issue for bargaining.[55] The addition of this day to the school calendar was in response to state law where Casimir Pulaski's birthday was changed from a commemorative holiday to a scheduled legal holiday. The labor relations board dismissed the complaint and appeal was made. An Illinois appellate court affirmed and concluded that the board was entitled to rely on the broad waiver language of the zipper clause of the agreement in determining that the union had waived its right to midterm bargaining.

Annexed and Consolidated Districts. Teachers in an annexed school district in Michigan brought an unfair labor practice charge against the annexing district. A hearing officer, as well as the Employment Relations Commission dismissed the charges. On appeal, the state appeals court held that the annexing district was not obligated to honor the contract between the annexed school district and its teachers. The teachers had claimed that the new district was the "alter ego" of the prior district, in that (1) the union of the two districts was planned by the two

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53. Lorain City School Dist. Bd. of Educ. v. State Employment Relations Bd., 533 N.E.2d 264 (Ohio 1988).

54. Crestwood Educ. Ass'n v. Crestwood School Dist., 535 A.2d 759 (Pa. Commw. Ct. 1988).

55. East Richland Educ. Ass'n, IEA-NEA v. Illinois Educ. Labor Relations Bd., 528 N.E.2d 751 (Ill. App. Ct. 1988).

boards, (2) the curriculum for the new district was jointly prepared, and (3) many former employees of the annexed district were assigned to the new district. However, the court disagreed and applied the *Crawford* test requiring the district to show that the consolidated district is substantially identical to the prior districts. This test was not passed to the court's satisfaction, given the significant changes in "management, supervision, and ownership." Furthermore, the court observed that most case law supporting an "alter ego" relationship involves private, rather than public employers and that in the present case such a relationship did not exist.[56]

Dismissal, Nonrenewal, Reduction-in-force, Layoff, and Demotion. An Oregon teacher was removed as head basketball coach and filed a grievance alleging race and age discrimination. The district claimed that the grievance was not arbitrable and the association filed an unfair labor practice complaint with the ERB. Following a review, the ERB ordered the district to arbitrate and the district sought judicial review. Shortly thereafter, the former coach filed a civil rights action in federal court, which he won. The district settled with the former coach, and he then withdrew his grievance. However, the association and the district continued their disagreement over the arbitrability of discrimination cases that involve only extra duties. On appeal to the state court of appeals, the petition was dismissed as moot: the district's petition for review was moot, because of the settlement between the district and teacher; likewise, the ERB case was moot, notwithstanding the continuing dispute between the union and the employer.[57]

An unfair labor practice was alleged in another Oregon case where two school secretaries were discharged. The secretaries claimed that the principal's personal notes (i.e., his "problem" file) were personnel records and were therefore accessible. The ERB dismissed the complaint and judicial review was sought. The state court of appeals reversed and remanded. On remand, the ERB ordered the district to reinstate the employees and to give them back pay. Furthermore, the principal was to cease and desist from maintaining his personal records and the district was to expunge all such records from the files. The court further noted that the evidence supported ERB's finding that the knowledge of the undisclosed files could have had a significant effect on the employee's conduct and the decision to terminate.[58]

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56. Michigan Educ. Ass'n v. North Dearborn Heights School Dist., 425 N.W.2d 503 (Mich. Ct. App. 1988).

57. Portland Ass'n of Teachers v. Portland School Dist., 764 P.2d 965 (Or. Ct. App. 1988).

58. Oregon School Employees Ass'n v. Lake County School Dist., 763 P.2d 160 (Or. Ct. App. 1988).

In yet another Oregon case, a maintenance worker was discharged allegedly because of his habitual tardiness. The plaintiff claimed that the district had failed to follow agreed upon procedures in reaching its decision to dismiss. The ERB denied the complaint and the union sought judicial review. The Oregon Court of Appeals held that where the collective bargaining agreement stipulated specific procedures and standards, the ERB was required to determine whether the district had complied.[59]

A nonrenewed North Dakota teacher sought mandamus in a case before the state supreme court.[60] The nonrenewal decision was based on the fact that the teacher had failed to earn either eight semester or twelve quarter hours of summer school and extension course credit every five years. The teacher claimed that he should be reemployed because he was able to earn the necessary credit prior to the beginning of the sixth year, although he in fact had not earned the credit by the end of the fifth school year as stipulated in the collective bargaining agreement. The state supreme court held that the teacher was not entitled to renewal of his contract due to his failure to meet the credit hour requirement.

A teacher in Wisconsin was discharged for gross sexual misconduct against a fellow teacher. The arbitrator upheld the dismissal and the teacher appealed. A circuit court judge denied the teacher's motion to intervene as an independent party and confirmed the decision. On further appeal, the state court of appeals upheld the lower court ruling.[61]

A custodian in Washington appealed a school board decision denying him the opportunity to file a grievance following layoff. The collective bargaining contract provided that seniority would be used in the event of layoff, unless the district determined that a less senior employee had greater ability and a better performance record. Furthermore, an employee could not be terminated without cause. Nevertheless, the plaintiff was laid off only ten days prior to the hiring of two new custodians and claimed to have equal or greater ability and performance record when compared to the junior employee who was retained at the time of his layoff. The trial court dismissed the complaint and the custodian appealed. The appeals court reversed based on procedural issues.[62]

In a second case involving a school custodian, a former employee sued the district seeking damages for breach of contract and mental suffering caused by the "outrageous conduct" of his former supervisors.

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59. Oregon School Employees Ass'n, Chapter 89 v. Rainier School Dist. 13, 754 P.2d 9 (Or. Ct. App. 1988).

60. Feldhusen v. Beach Pub. School Dist., 423 N.W.2d 155 (N.D. 1988).

61. Milwaukee Bd. of School Directors V. Milwaukee Teachers' Educ. Ass'n, 422 N.W.2d 149 (Wis. Ct. App. 1988).

62. Trammell v. Riverview School Dist. No. 407, 752 P.2d 951 (Wash. Ct. App. 1988).

He alleged that he was periodically harassed on the job and that on one occasion, following a heated argument, was told to "get his ass out of the building." He later refused to return to work. His refusal was processed as a "quit." Shortly thereafter, the plaintiff filed a claim alleging termination without cause. Following a three-tiered grievance procedure, an arbitrator found that the plaintiff had voluntarily terminated his employment. The board accepted the decision, and the association did not contest the award. The former custodian, however, filed suit. The state court of appeals held that the evidence supported the finding of constructive discharge, but that the award for mental suffering was not precluded by the Workmen's Compensation Act or the Governmental Immunity Act. Accordingly, the case was remanded with directions.[63]

A teacher in Connecticut requested a leave of absence, which was granted. On his return, however, he failed to meet the contractual deadline for providing notice that he intended to return to work. As a result, he was not at that time reemployed, nor was he later rehired for his former job, or for any other. He then filed suit. On appeal, the state supreme court reasoned that the Teacher Negotiation Act and the arbitration statutes provide a preference for resolving disputes between teachers and boards through grievance proceedings and held that the trial court lacked subject matter jurisdiction.[64]

The State Employment Relations Board (SERB) in Ohio dismissed a charge by a public school employee that an unfair labor practice had occurred.[65] The association appealed that decision to a court of common pleas and later to the Ohio Court of Appeals, where the dismissal was affirmed. The appeals court reasoned that (1) the association did not have the right to file an appeal where administrative proceedings were quasi-judicial and (2) the SERB order dismissing the charge was not an "appealable final order."

A nontenured teacher in Kansas was nonrenewed for the upcoming year. No reason was given for the nonrenewal, while all prior evaluations of her work were satisfactory. She filed suit claiming that the board had breached its contractual duty to provide notice to her of any alleged unsatisfactory performance. The state supreme court held that the master agreement provision requiring notice of deficiency and a plan of assistance did not apply to her in the instant case and could not serve as a basis for a breach of contract claim. Only those teachers receiving unsatisfactory evaluations were eligible for assistance. Given the above,

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63. Hoffsetz v. Jefferson County School Dist. No. R-1, 757 P.2d 155 (Colo. Ct. App. 1988).

64. Kolenberg v. Board of Educ. of Stamford, 536 A.2d 577 (Conn. 1988).

65. Ohio Ass'n of Pub. School Employees v. Cleveland City School Dist. Bd. of Educ., 524 N.E.2d 532 (Ohio Ct. App. 1987).

because her performance was not evaluated as unsatisfactory, she was not eligible for assistance.[66]

A nontenured Illinois teacher was terminated by his local board allegedly in violation of the negotiated agreement. Such agreement requires certain procedures for evaluating and terminating teachers as well as grievance-arbitration procedures for resolving related disputes. After being terminated, the teacher filed a grievance and was awarded reinstatement and back wages and benefits. The district appealed to the circuit court where the arbitrator's award was vacated. On appeal, the appellate court reversed the circuit court holding and ruled that said court lacked jurisdiction to vacate or enforce an arbitration award because the original jurisdiction over educational disputes belonged exclusively to the Illinois Educational Labor Relations Board. That decision was affirmed on further appeal to the state supreme court.[67]

In Pennsylvania, an education association filed a grievance when a vocational-technical school discontinued its policy of offering teachers who had been demoted to half-time status the opportunity to substitute. The plaintiffs challenged the practice based on wording within the collective bargaining agreement requiring that "[n]o professional employee shall be reduced in rank or compensation or deprived of any professional advantage as defined in the Public School Code without just cause . . . ." The arbitrator sustained the grievance and noted that although the contract did not provide recall rights for the demoted teachers, such rights did in fact exist under state law. The district appealed the arbitrator's decision and the trial court vacated the award. That decision, however, was reversed on appeal to the Commonwealth Court of Pennsylvania. That court held that because the bargaining agreement incorporated the school code, the arbitrator's decision was encompassed within the agreement and had to be given deference by the court under the "essence test."[68]

In another Pennsylvania case, a nontenured teacher was evaluated as unsatisfactory and was told that his employment would be terminated at the conclusion of the year. The teacher then filed a grievance requesting that an arbitrator determine the appropriateness of both the procedure and the decision. The district initially refused to arbitrate because it claimed that the agreement did not apply to nontenured teachers, but, following the filing of an unfair labor practice charge, entered into an agreement to arbitrate. The arbitrator held in favor of the teacher and the

66. Miller v. Board of Educ. Unified School Dist. 470, 752 P.2d 113 (Kan. 1988).

67. Board of Educ. of Community School Dist. No. 1, Coles County v. Compton, 526 N.E.2d 149 (Ill. 1988).

68. Northumberland County Area Vocational-Technical School Educ. Ass'n v. Northumberland County Area Vocational-Technical School, 547 A.2d 1287 (Pa. Commw. Ct. 1988).

district appealed. The court held that the arbitrator's decision was not unreasonable and drew its essence from the terms of the agreement.[69]

Promotion. A junior employee in Iowa was promoted over two more senior employees, while one of the senior employees was not reinstated after she had resigned. A grievance was filed with the ERB, but was dismissed; the ERB had concluded that the district had successfully rebutted the prima facie case by showing a legitimate business justification for each of its disputed personnel decisions. The state court of appeals upheld the ERB decision.[70]

Impasse and Fact-Finding

The Department of Defense Dependents Schools (DODDS) operates schools in twenty countries where there are United States military installations. An impasse had resulted in negotiations involving DODDS and the teachers' union, the Overseas Federation of Teachers. The Fourth Circuit Court of Appeals held that when the Federal Services Impasses Panel delegates its authority to resolve bargaining impasses to an individual panel member, decisions of that member, which become part of the negotiated agreement, are subject to agency head review.[71]

Strikes and Sanctions

This section includes four cases dealing with teacher strikes: three from Pennsylvania and one from Oregon. In the first Pennsylvania case, a school district and an education association were unable to agree to the terms of a new contract. As a result, the teachers went on strike. A tentative agreement was agreed to following the filing of suit by the district seeking an injunction to direct the teachers to go back to work. However, when the agreement was to be formalized, two board members who originally had voted for the contract later voted against acceptance. The teachers then filed an unfair labor practice suit. The trial court, and later the commonwealth court on appeal, concluded that the district was not acting in good faith and that it had committed an unfair labor practice.[72]

In the second Pennsylvania case, the state supreme court was asked to reconcile two state laws: the Public Employees Relations Act, which gives teachers the right to strike; and the Public School Code, which mandates

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69. Mifflinburg Area Educ. Ass'n v. Mifflinburg Area School Dist., 545 A.2d 419 (Pa. Commw. Ct. 1988).

70. Valley Educ. Support Personnel Ass'n v. Public Employment Relations Bd., 420 N.W.2d 495 (Iowa Ct. App. 1988).

71. Department of Defense Dependents Schools, Alexandria, Va. v. Federal Labor Relations Auth., 852 F.2d 779 (4th Cir. 1988).

72. St. Clair Area School Dist. v. St. Clair Area Educ. Ass'n, 552 A.2d 1133 (Pa. Commw. Ct. 1988).

that school districts provide 180 days of pupil instruction. Teachers in Jersey Shore Area School District had been on strike for one month when the Chancellor issued an injunction ordering the teachers back to work. On appeal, the commonwealth court affirmed solely on the basis that the district would not be able to provide instruction for the required 180 days if classes did not begin again, thus resulting in a loss of state subsidies. On further appeal, the state supreme court affirmed, although it disagreed with the appeals court that the threatened loss of subsidies alone would support the issuance of an injunction. The court went further to observe that there were a myriad additional economic and other factors supporting the need to end the strike and that the strike had resulted in "impending and . . . ever-increasing harm which was being wrought upon [the] students," and that, "the health and welfare of the students . . . was clearly endangered and threatened."[73]

In the final Pennsylvania case, a common pleas court judge had ordered striking teachers to return to work. His decision then was appealed to the commonwealth court. Similar to the above case, the court held that the strike made it unlikely that 180 instructional days could be offered by the district and the district would therefore lose state subsidies. Accordingly, the commonwealth court found that an injunction had been properly issued by the trial court. However, the commonwealth court further concluded that the trial court had exceeded its authority when it ordered bargaining to continue and when it dictated bargaining hours.[74]

In the final case in this subsection and chapter, parents of two elementary school children in Oregon filed suit claiming that their children's state constitutional rights were violated by a statute authorizing teacher strikes. They sought to bar the local education association from striking, to require the union and the school district to submit to binding arbitration, and to have the Public Employees Collective Bargaining Act declared unconstitutional, insofar as it authorized the right to strike. However, the strike ended prior to resolution of the dispute in court. Nevertheless, the parents claimed that the charges were not moot since they were capable of repetition. The state court of appeals disagreed and declared each of the claims moot: the strike was over; there was no continuing need for arbitration; and the parents were not seeking relief against future strikes.[75]

CONCLUSION

The number of cases dealing with collective bargaining continues to

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73. Jersey Shore Area School Dist. v. Jersey Shore Educ. Ass'n, 548 A.2d 1202, 1207-1208 (Pa. 1988).

74. Armstrong Educ. Ass'n v. Armstrong School Dist., 542 A.2d 1047 (Pa. Commw. Ct. 1988).

75. Reiman v. Eugene Educ. Ass'n, 759 P.2d 295 (Or. Ct. App. 1988).

be significant, particularly in those states with liberal bargaining laws (e.g., Ohio, Pennsylvania). The vast majority of cases were filed in state courts and were based on state law. This trend no doubt will continue. Cases decided this past year were typical of those filed in recent years. Common topics continued to be scope of bargaining, arbitrability, and conditions of employment. No new trends or directions are seen for 1989.

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PUPILS

Henry S. Lufler, Jr.

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INTRODUCTION

A United States Supreme Court decision involving student expression[1] and one addressing charges for bus transportation to school[2] were handed down in 1988. Both serve as evidence that the Court is willing to expand the power of school boards to set policies regarding the operation of the public schools at the expense of student rights.

In addition to ruling in favor of the school defendants in the expression case, the Court went on to create a broad definition of what constitutes the pedagogy and curriculum of a school, over which officials retain sole

1. Hazelwood School Dist. v. Kuhlmeier, 108 S. Ct. 562 (1988).
2. Kadrmas v. Dickinson Pub. Schools, 108 S. Ct. 2481 (1988).

control. The expression opinion had an immediate impact on several subsequent 1988 cases, including one district court decision that affirmed the right of a school board to remove Chaucer from a humanities course curriculum because of its sexual vulgarity.

The attempts by school officials to limit drug use and sales also continued to be a source of litigation in 1988. Search and seizure issues were raised in some of the cases while another set argued the severity of suspension and expulsion penalties. Schools continue to prevail in a high percentage of all these cases, unless the drug use or sales occurred outside of the school and away from school activities.

Public School Assignment, Tuition, and Transportation

Tuition and Assignment

Challenges to state statutes regulating school attendance are filed by parents who seek to enroll their children in schools other than the one they were assigned, or by school districts that wish to avoid paying the tuition for a district student to attend school elsewhere. While these challenges generally are made on constitutional grounds, courts most frequently decide such cases using narrow statutory interpretations.

The 1988 tuition and assignment cases all were heard by state courts. The Supreme Court of Arkansas heard a challenge made by a local school district to a statute that permits the children of public school teachers to attend school where the parent taught, even if the parent lived outside the district.[3] The teacher's school system argued that this statute violated the equal protection clauses of the federal and state constitutions because it conferred a benefit on teachers that was not available to other classes of workers.

The Arkansas court rejected the district's argument, using a rational relationship analysis. The court found that the statutory provision served a rational state purpose by aiding in recruiting and keeping teachers. While the district argued that enrollment pressures in the district receiving such students should be considered, the Arkansas court concluded that this was an argument more properly directed to the legislative branch.

The Supreme Court of Nebraska heard a challenge to that state's statute regarding the level of tuition that can be assessed to school districts without high schools whose students attend secondary school in an adjoining district.[4] The statute sets standards for the tuition to be charged, allowing the state board to set the maximum tuition but permitting the receiving district to lower the tuition to a level no lower than the per-pupil

3. Love v. Hill, 759 S.W.2d 550 (Ark. 1988).
4. Ewing v. Scotts Bluff County Bd. of Equalization, 420 N.W.2d 685 (Neb. 1988).

cost of instruction in the district. A lower court had found that the statute provided insufficient guidance to receiving districts on the standards to be used when districts wanted to reduce the state-set tuition.

The Nebraska high court upheld this portion of the lower court's decision, but disagreed with the rest. After holding that the offending portion of the statute could be severed from the remainder, the court went on to decide that the state board could set a higher level for tuition than the annual per-pupil cost in the receiving district. Disagreeing with the lower court on this point, the state high court observed that receiving districts had made capital investments in their schools that would permit the additional tuition.

A South Carolina appeals court heard a challenge to a statute that permits parents to enroll their children in adjoining school districts if the distance to the school outside the child's district is shorter than the distance to the one the child normally would attend.[5] The district attempted to institute a policy that it would pay for tuition in such cases only if the difference in the distance exceeded five miles. The appeals court concluded that local districts were not permitted to alter the literal interpretation of statutes by adding conditions.

A similar statutory dispute arose in New York, where that state's law permits parents with contiguous property in two school districts to select the district where their children might be educated. In this instance, parents purchased 0.1 acre in the next district, causing the school district boundary to pass through the combined property. The receiving district objected, but the appeals court held that the motivation behind the purchase was irrelevant and that a clear reading of the statute compelled the admission of the children.[6]

Appeals of local board assignment decisions can be made to state superintendents in a number of states. Such an appeal occurred in a South Dakota assignment squabble that was marked by clerical errors leading to erroneous findings of fact during the administrative appeal.[7] A local district challenged the state superintendent's order requiring them to admit a student, using both technical and state constitutional grounds. The South Dakota Supreme Court rejected both of the defendant's approaches, holding that the superintendent had broad statutory powers in such cases and that the superintendent had not abused his power in the case, even though some of his findings were based on untrue assertions.

An Arizona statute permits children to live with their grandparents or other relatives and to attend school in the relative's district if their

5. Smith v. Wallace, 369 S.E.2d 657 (S.C. Ct. App. 1988).
6. Crowe v. MacFarland, 525 N.Y.S.2d 429 (App. Div. 1988).
7. Finck v. Northwest School Dist. No. 52-3, 417 N.W.2d 875 (S.D. 1988).

"emotional health" is best served by the placement. The relative need not be the formal guardian of the student. A student who had been abandoned by her mother and whose father was unknown sought admission to the Phoenix school nearest her grandmother's house where she was living. She was denied admission. Without deciding whether the district had willfully ignored the statute, the appeals court ordered her admitted under the "emotional health" exception.[8]

A Michigan appeals court used a rational relationship test to affirm a local board policy regarding attendance at two high schools in the district.[9] The policy was established to help balance enrollments in the two schools and required students in the low-enrollment school to attend that school but gave students in the high-enrollment school the chance to transfer. The appeals court rejected equal protection claims made by the parents and found that the policy had a rational basis because it was directed at reducing the effects of overcrowding. The parents filed suit because their daughter lost the opportunity to train with a particular swimming coach at the school she wished to attend.

Transportation

Two cases challenging the use of fees for the provision of school bus service to children living in rural areas were heard in 1988. In the first, the United States Supreme Court rejected an equal protection attack on a North Dakota statute that permitted the fee levy. In the second case, a California appeals court sustained a similar challenge, holding that a fee for bus service violated that state's constitution.

Similar issues were present in both cases. The two courts each examined claims by the plaintiffs that the fee statutes should be subjected to strict or heightened scrutiny because classes of citizens based on wealth were created by the laws. Each was also asked to rule that the fee resulted in withholding an important governmental benefit on the basis of economic status,[10] thereby violating the equal protection clause. Finally, both courts were asked to apply *Plyler v. Doe*,[11] where the Supreme Court held that a "permanent underclass" of uneducated citizens would be created if the children of undocumented aliens were not educated, to the busing fee question.

Kadrmas v. Dickinson Public Schools[12] involved a challenge to

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8. Sleeseman v. State Bd. of Educ., 753 P.2d 186 (Ariz. Ct. App. 1988).
9. Palmer v. Bloomfield Hills Bd. of Educ., 417 N.W.2d 505 (Mich. Ct. App. 1987).
10. Smith v. Bennett, 365 U.S. 708 (1961) (certain criminal appeals cannot be prevented with a filing fee requirement); Lindsey v. Normet, 405 U.S. 56 (1972) (appeals in certain landlord-tenant cases cannot contain an excessive bond requirement).
11. 457 U.S. 202 (1982).
12. 108 S. Ct. 2481 (1988).

North Dakota's statute[13] that permits nonreorganized school districts to charge a fee for transportation services. The statute does not allow a charge in districts where school consolidation has occurred. Part of the purpose of the challenged law, in fact, was to encourage school reorganization by requiring free transportation for school children if reorganization referenda were adopted. In 1987, the North Dakota Supreme Court was evenly divided on the question of whether the statute violated the state's equal protection clause, letting stand a lower court ruling that it did not.[14]

The plaintiff's daughter, Sarita, attended school in a nonreorganized district. The Dickinson school system assessed her parents a $97 annual charge for her transportation. The family lived sixteen miles from her school and had an annual income that was at or near the poverty level.

The Supreme Court upheld the fee by a five-to-four margin, rejecting the plaintiff's argument that the denial of free transportation was a denial of the right to an education. While the plaintiffs explicitly urged that the statute be reviewed in the light of the *Plyler* decision, the Court rejected the comparison, holding that the district had no legal mandate to provide transportation and therefore there could be no requirement that it be provided for free. The majority also held that it did not violate the equal protection clause for the state to require free transportation in reorganized districts but not in Dickinson, holding that the statutory distinction served the legitimate state purpose of encouraging reorganization.

Two dissents were recorded, with Justice Marshall, joined by Brennan, arguing that since the statute discriminated on the basis of economic status it violated the equal protection clause. Justice Stevens, joined by Blackmun, took a narrower view, holding that the statute no longer served a rational purpose since it had been in place for many years and had not led to reorganization in communities like Dickinson, serving now only as an "obstacle in the paths of poor children." Following this approach, the dissent concluded that the challenged statute would fail the rational relationship test.

A California appeals court heard a challenge to that state's statute that permitted the charging of transportation fees, a fee levied by only sixty of the state's 1,049 school districts.[15] Unlike the North Dakota statute, California explicitly provided for a waiver when parental income fell below certain guidelines. The waiver, however, did not persuade the court that the policy was advertised to all who might benefit from it, nor

13. N.D. Cent. Code § 15-34.2-06.1 (1981 and Supp. 1987).

14. Kadrmas v. Dickinson Pub. Schools, 402 N.W.2d 897 (N.D. 1987). *See* The Yearbook of Education Law 1988 at 70-1.

15. Salazar v. Honig, 246 Cal. Rptr. 837 (Ct. App. 1988).

was it clear that the fee would not be a significant hardship to those whose income barely surpassed the cutoff.

Using state precedents, the appeals court concluded that the fee violated the California Constitution, establishing classifications based on wealth and violating the state requirement of a free education. Using strict scrutiny analysis, the law was struck down over objections by the state defendants that local districts who charge a fee should be added as parties to the case to offer a defense. Attorney fees also were awarded to the plaintiffs.

Home Instruction

Home instruction cases present a clash between two deeply held values, the right of parents to determine the education to be received by their children and the right of the state to ensure that all children receive at least a basic education. The 1988 home instruction cases, considered as a group, raised every conceivable argument on behalf of parental rights. Nevertheless, as seen over the years in these cases, courts remain reluctant to strike down state supervision or regulation of home instruction programs. The 1988 litigation also was characterized by an unusual feature, with the same attorney representing the parents in four of the six cases.

In a case raising the full panoply of home instruction issues, New York plaintiffs were unable to convince a federal court that the state statute setting minimum standards for home instruction was unconstitutional.[16] New York's statute requires home instruction to be "essentially equivalent" to that offered in the public schools. Local school officials are charged with making the equivalence determination, and parents must submit a calendar, curriculum, and test scores for older children to assist in the process. Also at issue in the case were on-site visits by local school officials that were a part of the approval process.

Among the challenges raised by the plaintiffs were allegations that the statute was overly vague, that it violated the establishment and free exercise clauses of the first amendment, and that the visits violated the right to privacy guaranteed by the fourth and fourteenth amendments. At the outset, the court also had to address complicated jurisdictional issues, because the parents were involved in varying degrees with state court actions. One family, for example, had been found not to have neglected the education of their children in state proceedings, though the court in that action expressed concern about the ability of the parents to educate the children as they became older.[17] The district court con-

16. Blackwelder v. Safnauer, 689 F. Supp. 106 (N.D.N.Y. 1988).
17. *In re* Blackwelder, 528 N.Y.S.2d 759 (Sup. Ct. 1988).

cluded, however, that the issues presented by two of the three plaintiffs were ripe for consideration.

The federal court rejected each of the plaintiffs' claims. The court held that local determination of the quality of a home instruction program was not, per se, overly vague, and that state curriculum standards provided an adequate guideline for the review. The court also mirrored other previous cases in this area by holding that the slight loss of religious rights inherent in the regulations was justified by the compelling state interest that all children receive a basic education. The court added that the statute represented the least restrictive means of ensuring that the state's interest was maintained. On the privacy question, the court refused to find that a visit scheduled at the parent's convenience and confined to the area in the home where instruction took place represented an intrusion so substantial as to violate the constitution.

A new home instruction issue was raised in this case and in one from North Dakota that follows. The plaintiffs argued that local school officials were "biased decision-makers" because their decisions arguably affected the per-pupil state aid received by the district. The district court, characterizing this claim as "nothing more than conclusory," held that administrative and judicial review of a local administrator's decision was adequate to protect parents against possible abuse.

The court awarded summary judgments to the defending school districts on all issues. It refused, however, to award fees to the districts, holding that none of the plaintiffs' claims sunk "to the level of frivolity" necessary to meet the requirements of 42 U.S.C. section 1988.[18]

North Dakota statutes require that home instruction be provided by a certified teacher. The statute was upheld by the state supreme court in 1986 with the court holding that the requirement was one of the least restrictive means of ensuring that children educated at home received an adequate education.[19] Similar arguments to those rejected by the court were again advanced in two 1988 cases, and again the plaintiffs' arguments were found to be unpersuasive.

In the first case, the plaintiffs argued that a state task force had developed less restrictive methods of reviewing home instruction programs, demonstrating that the certification requirement was unnecessary. The North Dakota high court, however, refused to accept this reasoning after noting that the state legislature had declined to change the statute.[20] The court also rejected the argument that local school administrators had a financial stake in the monitoring of home instruction

18. The 1976 Civil Rights Attorneys' Fees Award.

19. State v. Patzer, 382 N.W.2d 631 (N.D. 1986). *See* The Yearbook of School Law 1987 at 83.

20. State v. Anderson, 427 N.W.2d 316 (N.D. 1988).

programs, holding that local monitoring was a ministerial function that required no subjective judgments.

The second North Dakota case presented a different issue because a lower court judge had found the parents "not guilty" of a compulsory attendance school law violation, holding that the state statute violated their right to free exercise of religion. The plaintiffs argued that a state appeal in the case constituted double jeopardy because they were being tried a second time for a criminal violation. The supreme court held, however, that the lower court decision represented a dismissal of the charge, rather than a verdict, and that the state properly could appeal.[21] The court went on to reject again the first amendment claims advanced by the plaintiffs. In both North Dakota cases, one justice issued a minority opinion to indicate that he had abandoned his court's 1986 reasoning regarding certification as comporting with freedom of religion.

The Eighth Circuit Court of Appeals heard a case challenging the constitutionality of the Arkansas Home School Act.[22] Arkansas has a permissive statute regulating home instruction, with the annual testing of students educated at home as its central provision. Parents select the test to be administered from a list of national tests prepared by the state. The test is given by a test administrator, with the parents present if they wish. The plaintiffs argued that the test violated their free exercise rights and the equal protection clause, since no testing is required of students who attend private schools in the state.

The appeals court rejected both arguments in a brief decision. The court found that the testing scheme represented the least restrictive way for the state to monitor home education and that it had little impact on the plaintiff's religion rights. The equal protection argument also was dismissed, through the application of a rational relationship test, with the appeals court finding that the state had good reason to assume that private school attendance provided a greater guarantee of educational progress.

Small fundamentalist Baptist church schools in Iowa challenged that state's equivalent instruction requirement, and a federal district court ruled in 1985 that the term, which was not defined in the statute, was unconstitutionally vague.[23] While also addressing other issues that were involved in the case, the Eighth Circuit remanded the equivalent instruction issue to the district court for reconsideration in light of new state regulations that became effective early in 1986.[24] The new standards

21. State v. Melin, 428 N.W.2d 227 (N.D. 1988).
22. Murphy v. Arkansas, 852 F.2d 1039 (8th Cir. 1988).
23. Fellowship Baptist Church v. Benton, 620 F. Supp. 308 (D. Iowa 1985).
24. Fellowship Baptist Church v. Benton, 815 F.2d 485 (8th Cir. 1987).

specify that instruction must be offered by certified teachers and must fulfill certain other minimum requirements.

The district court heard from the parties in the case, with the plaintiffs continuing to argue that the new standards were vague. The court disagreed, ruling that private schools had adequate notice of the standards and that they contained sufficiently explicit criteria.[25]

Compulsory Attendance

Compulsory attendance cases in 1988 focused on two quite different issues: the use of contempt of court and subsequent detention of juveniles to force them to attend school, and challenges to state laws requiring students to be inoculated before attending. Both areas had been relatively quiet until this year.

The Supreme Court of California, sitting en banc, heard a challenge to the use of a lower court's contempt powers.[26] The student had been ordered to serve forty-eight hours in a locked facility after he was found to be in contempt of court for violating a judge's order that he attend school. While other state courts have upheld the use of such penalties, to be administered only to juveniles who were under the protection of the state and only after a hearing, the California court had not previously addressed the issue.

An examination of legislative intent in several California juvenile statutes convinced the court that the legislature had never prohibited the practice. Observing that the holding of juveniles for contempt, always in settings away from other offenders, should "be used sparingly and with the utmost sensitivity,"[27] the court explicitly adopted four qualifications on a juvenile court's contempt powers that were developed by the Wisconsin Supreme Court in a 1983 decision.[28] Contempt could be used only when (1) the juvenile understood the order and had been given sufficient time to comply with it, (2) the violation of the court order was egregious, (3) less restrictive alternatives were considered and found to be ineffective, and (4) special confinement conditions were arranged.

A Wisconsin appeals court heard a challenge brought on behalf of a minor who had been found in contempt of court and institutionalized for truancy.[29] Unlike the California case just discussed, the student had been assigned to the facility for an indeterminant period until it was demonstrated that the student was attending school on a "regular basis." This was overly vague for the court, which held that the unspecified

25. Fellowship Baptist Church v. Benton, 678 F. Supp. 213 (S.D. Iowa 1988).
26. *In re* Michael G., 747 P.2d 1152 (Cal. 1988).
27. *Id.* at 1161.
28. *In re* D.L.D., 327 N.W.2d 682, 689 (Wis. 1983).
29. *In re* T.J.N., 416 N.W.2d 632 (Wis. Ct. App. 1987).

sentence amounted to a punitive sanction that could be imposed only after filing a complaint and conducting a hearing. The court also ruled that the Wisconsin statute requiring an educational evaluation of the student before the filing of truancy charges had not been followed.

The inoculation statutes of the states vary somewhat, but all contain some provision for the exclusion from the requirement for religious reasons. There generally is also some provision for the exclusion of uninoculated students during times of epidemic. Courts further have been reluctant to expand the religious exemption to students whose families have "religious-type" faiths, but who do not belong to an organized sect. This last issue was again tested in a case that reached the Second Circuit.[30]

The plaintiff in the case was a member of the Universal Life Church, a mail-order ministry in which one can become a minister or bishop upon the payment of a fee. The plaintiff also claimed that the family's personal view held that inoculations were contrary to the "genetic blueprint intended by nature," and that this view qualified them for an exemption under New York law. The appeals court, while observing that New York courts had construed the religious exception quite broadly, was unwilling to find that the plaintiff's views were religious in nature. Instead, the court likened them to strong, secular convictions. Likewise, after citing a series of cases that had characterized the Universal Life Church as a "tax dodge," or worse, the court refused to find that the organization was a religious group qualifying for the exemption.

Arizona's liberal inoculation statute allows children to attend school without vaccinations, but requires their immediate removal upon the declaration by a county health officer that an epidemic is present. This process was followed after an outbreak of measles in Maricopa County. Several parents brought suit, however, alleging that their rights had been violated because the epidemic had been declared before lab tests had confirmed the presence of measles in the school, though it was present in the community.[31]

After a lower court ruled in favor of the parents, an appeals court considered the case and reversed the lower court. Observing that almost 100% of those who are not inoculated acquire the disease when exposed to it, and that those who have it may acquire more life-threatening subsequent diseases, the appeals court found it perfectly reasonable that the health department would not want to wait for two weeks pending the return of laboratory tests that would confirm the presence of the outbreak in the school. Both religion and privacy arguments advanced by the plaintiffs were rejected.

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30. Mason v. General Brown Cent. School Dist., 851 F.2d 47 (2d Cir. 1988).
31. Maricopa County Health Dep't v. Harmon, 750 P.2d 1364 (Ariz. Ct. App. 1987).

Finally, a New York appeals court heard an appeal from a school district that did not want to pay legal fees assigned by a lower court to plaintiffs who successfully convinced the court that they qualified for a religious exemption from that state's inoculation requirement.[32] The section 1988 fees were awarded in the face of the defendant's argument that "special circumstances" should preclude the award. The district argued that it was following a good faith, literal reading of the law. The appeals court refused, however, to find that this good-faith defense qualified the district for the exception to section 1988.

PRIVATE AND PAROCHIAL SCHOOLS

Cases involving private and parochial schools are reported in the other sections of this chapter that discuss home instruction and first amendment religious rights. This section presents cases that deal with private school transportation, state law, and tuition contract issues. Two such cases were reported in 1988, focusing on a state transportation statute and alleged racial discrimination in the treatment of Philadelphia parochial-school students.

Minnesota's Equal Transportation Act allows school boards to provide student transportation to nonpublic schools outside the district if "the transportation is to schools maintaining grades or departments not maintained in the district or if the attendance of such children at school can more safely, economically, or conveniently be provided for by such means."[33] Parents of children enrolled in Catholic schools outside their district were charged $575 per student for bus service and filed suit in an attempt to obtain the service at no cost. They claimed that the schools to which they sent their children had unique departments and that they also qualified under the safety provision of the statute.

A Minnesota appeals court disagreed with the plaintiffs' reading of the statute.[34] While the parochial schools that served the children contained unique programmatic features, the court refused to find that these constituted "departments" under the terms of the statute. The court also rejected the safety argument, observing that the district had agreed to provide the service and that it was the charge that was in dispute.

The plaintiffs also raised an equal protection claim. This too was rejected, with the court observing that the plaintiffs had not introduced any evidence that other similarly situated private school students in the state were receiving the transportation for free.

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32. Campain v. Marlboro Cent. School Dist., 526 N.Y.S.2d 658 (App. Div. 1988).
33. Minn. Stat. § 123.78.1(a) and (b) (1986).
34. Eldredge v. Independent School Dist. No. 625, 422 N.W.2d 319 (Minn. Ct. App. 1988).

Parents of students enrolled in Philadelphia parochial schools filed a complaint with the state human relations commission alleging mistreatment based on race. The complaint cited claims of disproportionately harsh discipline meted out to minority students, harassment based on race, and offensive remarks directed at the students. When the commission began to investigate the complaints, under the procedures contained in the state human relations act, suit was filed by the archdiocese arguing that the schools fit the act's "distinctly private" exception and that the investigation exceeded the commission's jurisdiction. The case arguing this point was heard by the Commonwealth Court of Pennsylvania.[35]

For the court, the narrow question it considered was whether the schools constituted a "public accommodation" within the statute. The definition of such accommodations within the statute was lengthy, but did not include parochial schools. Given the detailed listing, the court ruled that the state commission could not add other institutions to the act's coverage without a change in the statute. The court therefore ordered the investigation of the complaints to stop.

SUBSTANTIVE RIGHTS OF STUDENTS

Search and Seizure

A large number of search and seizure cases continue to be recorded, with most focusing on the propriety of searches that produce evidence of drug use or sales. School defendants continue to prevail in cases where a "reasonable suspicion" of illegal activity is present. The definition of reasonableness is controlled by the United States Supreme Court decision in *New Jersey v. T.L.O.*[36] *T.L.O.* involved the search of a high school student's purse that led to the discovery of marijuana and evidence that the student had been selling the drug in her school. The Court found the search to be reasonable, establishing the standard that the search methods used must be "reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[37]

In only one 1988 case was a school search found to be unreasonable.[38] A Virginia middle school princial asked teachers to search students in their classes on several occasions, requiring students to empty the contents of their pockets, bookbags, and purses onto their desks. In one search the object was "Walkman" radios, which were prohibited in

35. Roman Catholic Archdiocese of Philadelphia v. Human Relations Comm'n, 548 A.2d 328 (Pa. 1988).

36. 469 U.S. 325 (1985).

37. *Id.* at 336.

38. Burnham v. West, 681 F. Supp. 1160 (E.D. Va. 1987).

school. On another occasion the search was aimed at uncovering marijuana after the principal detected marijuana smoke in a vestibule. Radios were confiscated in the first search and no drugs were found in the second.

The district court granted a summary judgment for the student plaintiffs, holding that both searches violated the fourth amendment. Absent any particularized suspicion, the general searches were found to be unreasonable. The court criticized school officials for failing to take a number of obvious steps in an attempt "to narrow the field of suspects." In a subsequent decision, the court ruled that school personnel were protected by sovereign immunity under state law from damage claims arising from the illegal search.[39]

A number of cases in 1988 raised questions about the propriety of searches involving student vehicles and lockers, following tips from other students or some other in-school evidence that a student possessed or was selling drugs. The Supreme Court of Colorado, sitting *en banc*, heard a challenge to a search of a student's car that uncovered a duffel bag containing a large quantity of marijuana.[40] The search of the car resulted from a report given to a police officer that the student had brought marijuana to school with the intent of selling it to other students.

A search of the student was not productive but a search of the car in which the student had been transported to school uncovered the drugs. The Colorado court found the search to be "justified from its inception" because of the tip received and the evasiveness of the student when he was questioned about the means he had employed to come to school that day. The court also refused to find that the security guard who conducted the search was acting as an agent of the police in carrying out the search or that the presence of the police officer, who was in the school on another matter, required that the more rigorous probable cause standard be employed to review the search. Evidence used in the search was permitted in a juvenile delinquency proceeding.

An Anchorage student was found guilty of cocaine possession following a search of his car that was parked outside his high school. A teacher reported that the student appeared to be under the influence of alcohol, and the investigating principal detected alcohol on the student's breath and observed him bumping into furniture when he attempted to walk. The search of the student's car did not uncover alcohol, but two grams of cocaine were found in the ashtray.

The plaintiff's attorney argued that the ashtray search was unreasonable, since alcohol was the substance being sought. An Alaska appeals court disagreed, finding that the failure to uncover the alcohol did not

39. Burnham v. West, 681 F. Supp. 1169 (E.D. Va. 1988).
40. *In re* P.E.A., 754 P.2d 382 (Colo. 1988).

preclude the further search.[41] The student had just returned from an off-campus lunch, but the time period for lunch was so short, the court reasoned, that it was unlikely the student could have reached his current disoriented state through the use of alcohol alone. The possibility that drugs were involved, then, made the search reasonable.

A California student told his principal, "[y]ou can search me if you want to," while denying that he possessed drugs. The principal, who was acting on a student tip, conducted a search that uncovered cocaine in the student's pocket. An appeals court upheld the reasonableness of the search and ruled that the principal was not required to warn the student that the evidence found might be used in a subsequent criminal proceeding.[42] In similar cases in recent years, courts consistently have rejected claims that *Miranda v. Arizona*[43] requires school officials to give the same warning to defendants that would be required of police officers.

A New Mexico high school student reported to a teacher that another student had tried to sell him marijuana. The report led to a locker search and the subsequent discovery of marijuana cigarettes. The search was found to be reasonable by a New Mexico appeals court.[44] In a similar case, Texas school personnel found marijuana in the lining of a student's coat after responding to a student report that he had bought marijuana from the plaintiff. This search was found to be reasonable, and the products of the search led to an adult criminal conviction, with the court holding that *T.L.O.* standards applied to adults as well as juveniles.[45]

A Florida search conducted by a sheriff's department employee working in the school, conducted in the presence of a police officer, led to the discovery of car keys to a vehicle allegedly stolen by a thirteen-year-old student. The student was convicted of juvenile delinquency, and an appeal was made on the ground that probable cause was required for the search. An appeals court sustained the appeal, remanding the case and concluding that the sheriff's employee was not acting as a school official in conducting the search, which was part of a criminal investigation originating outside the school.[46]

School drug tests constitute a search under the terms of the fourth amendment. While few reported decisions have been made regarding drug testing in the school setting, those that do have suggested that some individualized suspicion is required and that totally random drug testing

41. Johnson v. State, 762 P.2d 493 (Alaska Ct. App. 1988).
42. *In re* Corey L., 250 Cal. Rptr. 359 (Ct. App. 1988).
43. 384 U.S. 436 (1966).
44. State v. Michael G., 748 P.2d 17 (N.M. Ct. App. 1987).
45. Irby v. State, 751 S.W.2d 670 (Tex. Ct. App. 1988).
46. F.P. v. State, 528 So. 2d 1253 (Fla. Dist. Ct. App. 1988).

is unconstitutional.[47] An Indiana district court considered a different variety of antidrug program in a 1988 case that reviewed the proposed testing of students as a precondition to participation in high school athletics.[48]

The school's program was constructed such that it avoided some of the issues raised in previously challenged drug-testing programs. The urinalysis test samples were to be gathered without an outsider present as a witness and were to be administered only to athletes and cheerleaders. A positive test result led only to a denial of the right to participate in athletic competitions and had no other disciplinary or criminal consequences.

Substantial expert witness testimony was taken in the case and reported by the court in its opinion. For the court, the testimony led to the conclusion that there were unique health and safety risks that were present for athletes who used drugs that were absent for nonathletes. The "unique identity" enjoyed by athletes also was cited by the court as justification for singling out this group of students. Finally, after reviewing cases that show there is no fundamental right held by students to participate in athletics, as distinct from the right to an education, the court concluded that it would not restrain the proposed program. The case, then, departs from the individualized suspicion standard, but does so after making it clear that the decision applies only to the proposed program.

First Amendment Religious Rights

A variety of interesting religious-rights cases were heard by courts in 1988. The issues litigated included the use of mobile classrooms to provide chapter I[49] services, minutes of silence, Saturday high school graduation ceremonies, prayers offered before band practice, and school dances opposed by local ministers. The right of persons to practice their religion clashed in most of the cases with the constitutional prohibition against state sponsorship of religious activities.

The Eighth Circuit Court of Appeals heard two cases arising from a challenge to the use of mobile classrooms parked on parochial school grounds in which chapter I federally funded remedial education programs were offered to the private school students. The plaintiffs' challenge asserted that the use of the classrooms was a deliberate attempt to

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47. *See* Anable v. Ford, 653 F. Supp. 22 (W.D. Ark. 1985), *modified*, 663 F. Supp. 149 (W.D. Ark. 1985); Odenheim v. Carlstadt-East Rutherford Regional School Dist., 510 A.2d 709 (N.J. Super. Ct. Ch. Div. 1985).

48. Schaill v. Tippecanoe County School Corp., 679 F. Supp. 833 (N.D. Ind. 1988).

49. The Education Consol. and Improvement Act of 1981, 20 U.S.C. §§ 3801-8 (1982 and Supp. III, 1985).

circumvent the Supreme Court's ruling in *Aguilar v. Felton*.[50] The suit was filed by a variety of school officials acting as individuals and by parents.

Both of the cases heard by the appeals court focused on the standing of the parties rather than on the merits of the constitutional claim.[51] The key issue before the court was whether taxpayers had standing to challenge executive implementation, made through federal rules and policies, of a congressional spending program. The court concluded that such standing was lacking, using two Supreme Court decisions as precedent.[52] The court also dismissed the claim for damages against Secretary Bennett, holding that a "legitimate question" had been posed about the constitutionality of the guidelines he issued, entitling him to qualified immunity.

The appeals court's first decision ended the suit. It was reversed, however, by the same court three months later.[53] The Supreme Court's decision in *Bowen v. Kendrick*,[54] made a month after the first Eighth Circuit decision, led to the reversal. *Kendrick* involved the administration of grants made under a federal family planning act. The Supreme Court permitted a taxpayer challenge to the implementation of the family planning act, a parallel circumstance to the challenge presented to the Eighth Circuit regarding chapter I. The decision was remanded to the district court for a hearing on the use of the mobile classrooms. The court, however, declined to change its ruling dismissing Secretary Bennett as a party in the litigation.

The United States Supreme Court also ruled on an appeal of lower-court decisions that voided New Jersey's law requiring a minute of silence at the start of the school day. First amendment arguments did not play a part in the decision, however. Instead, the Court decided the case on an issue of standing, holding that the plaintiffs who brought the case could not pursue the appeal.[55]

After a refusal by the New Jersey executive branch to support the statute when it was challenged on establishment clause grounds, the case was litigated on behalf of the Speaker of the New Jersey Assembly and the President of the New Jersey Senate. Both individuals who held these positions were replaced, however, before the Supreme Court could consider their appeal. Their successors declined to continue the appeal

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50. 473 U.S. 402 (1985) (federal funds cannot be used to fund public school teachers who provide instruction on private school premises without violating the establishment clause).

51. Pulido v. Bennett, 848 F.2d 880 (8th Cir. 1988).

52. Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982) and Flast v. Cohen, 392 U.S. 83 (1968).

53. Pulido v. Bennett, 860 F.2d 296 (8th Cir. 1988).

54. 108 S. Ct. 2562 (1988).

55. Karcher v. May, 108 S. Ct. 388 (1987).

and the Court ruled that the original plaintiffs had lost their standing, thereby causing the case to be dismissed.

The Second Circuit heard an appeal of a memorandum decision that Saturday high school graduation exercises violated the free exercise rights of a Jewish student whose sabbath was Saturday.[56] The appeals court concluded, after reviewing cases showing that some loss of religious freedom was inevitable with a variety of state-sanctioned activities, held that the commencement principally was a "social occasion" that therefore could be scheduled on Saturday.

An Arkansas band director who led students in prayer before band practices and concerts precipitated a first amendment law suit. A district court found that the prayers violated the establishment clause. The district appealed, arguing that the case was moot because the prayers had ceased and that attorney fees awarded in the case were improper because the teacher's practice had not been approved by the school board. Both arguments were rejected by the Eighth Circuit.[57]

In denying the mootness argument, the appeals court held that there was no evidence that the board would not permit the practice to return, given the fact that the board had been approached by the plaintiffs several times before the suit was filed and had not adopted a policy against the prayers. The failure of the board to act also convinced the appeals court that the lower court's award of fees was reasonable, though the sum was reduced somewhat to omit fees associated with delays sought by the plaintiffs that were attributed to the failure of their attorney to meet court deadlines.

The desire by some students to attend school dances and the belief by some residents of Purdy, Missouri, that dancing was sinful led to a case considered in federal court.[58] Dances were not permitted by school rules, leading to a situation in which proms were bifurcated into two sections, with dancers forced to attend an off-campus portion of the event held without teacher supervision and school sponsorship. The school board also refused to rent school space to a community group so that it could hold school dances and would not allow money raised at an off-campus dance to pay for a class trip.

In testimony offered by school board members, characterized by the court as "not particularly credible," the members denied that fundamentalist religious beliefs in the community were related to their policy. The plaintiffs, however, argued that the rule violated the establishment clause by forcing religious beliefs onto school students and staff. The court employed the test for establishment clause violations found in

56. Smith v. North Babylon Union Free School Dist., 844 F.2d 90 (2d Cir. 1988).
57. Steele v. Van Buren Pub. School Dist., 845 F.2d 1492 (8th Cir. 1988).
58. Clayton v. Place, 690 F. Supp. 850 (W.D. Mo. 1988).

Lemon v. Kurtzman[59] and concluded that the dancing ban had no secular purpose. The court went on to observe that the rule could, in fact, make some impressionable students believe that their religion was inferior, if it was one that permitted dancing. Damages of $1 and attorney's fees were awarded to the plaintiffs.

The terms of the Federal Equal Access Act,[60] designed to permit student-initiated religious groups to function during student activity periods, were argued in a state of Washington district court case.[61] Washington's state constitution permits no "sectarian influence" in the public schools. To comply with this provision, the defending school board permitted only clubs that were related to the school's curriculum to use school facilities. Requests by students to form a Bible study and prayer group therefore were denied. The court concluded that school officials had created a "closed forum" during the activity period by ensuring that only school-related activities would occur. Because a provision of the Act waives its requirements when it conflicts with state law, the court upheld the school's policy and dismissed the plaintiffs' case.

A California appeals court confronted related issues when it heard an appeal of a case resulting from a school principal's refusal to allow a student religious group to distribute flyers and advertise in the senior yearbook.[62] The school board, as in the previous case, had decided it wanted the school to operate under a "closed forum" policy. Only school-sponsored clubs were permitted to meet and use school facilities. The plaintiffs in the case, however, argued that they already used the facilities for informal luncheon meetings that took place in the school cafeteria. They sought to distribute flyers inviting other students to join in prayer and religious discussions.

The appeals court affirmed a lower-court ruling supporting the school board's decision against the distribution and the yearbook advertising. The appeals court found no justification to compel the school to have an open forum, under the Equal Access Act, if it did not wish to do so during the luncheon period. Using the *Lemon* test, the court also concluded that the policy had a secular purpose, avoided entanglement with religion, and neither advanced nor inhibited religion. In dissent, one of the three justices hearing the case felt that the plaintiffs should be left free to distribute "their harmless scraps of paper," suggesting that the establishment clause would not be violated by the distribution.

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59. 403 U.S. 602 (1971).

60. 20 U.S.C.A. § 4071 *et seq* (West 1985).

61. Garnett v. Renton School Dist. No. 403, 675 F. Supp. 1268 (W.D. Wash. 1987).

62. Perumal v. Saddleback Valley Unified School Dist., 243 Cal. Rptr. 545 (Ct. App. 1988).

First Amendment Freedom of Expression

The United States Supreme Court's sweeping decision in *Hazelwood School District v. Kuhlmeier*[63] influenced subsequent 1988 expression cases and will have a major impact on school law in the years to come. The case involved the censorship of a school newspaper that had sought to publish articles on teenage pregnancy and divorce. The pregnancy story contained a description of student sexual practices and birth control methods. The school principal deleted the two pages of the paper that contained the stories, doing so after concluding that those who were anonymously quoted in the story could be identified by readers. This, the principal decided, might cause them harm and lead to a subsequent tort action against the school. The defending school district also argued that the paper's content was subject to regulation because the paper was a part of the journalism curriculum.

The Eighth Circuit Court of Appeals rejected the curriculum argument and reached a factual determination that the paper was an open forum for the school, using statements published by the school itself to support the conclusion. The appeals court also applied a material disruption test, drawing on *Tinker v. Des Moines Independent Community School District*,[64] concluding that there was no evidence that disruption would occur were the stories published. Finally, the appeals court concluded that the consent obtained from those appearing in the stories adequately answered the school system's concerns about any invasion of privacy.[65]

The Supreme Court relied on the place of the newspaper within the curriculum in reversing the Eighth Circuit. The Court held, "[e]ducators do not offend the first amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns . . . ."[66] The five-to-three majority established the broadest possible definition of what constituted a school's curriculum, holding that only when school-sponsored expression has "no valid educational purpose" is the first amendment implicated such that judicial intervention would be warranted.

This control is permitted, the Court concluded, to ensure that students learn what the school is attempting to teach, to protect younger students from inappropriate material, and to ensure that individual

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63. 108 S. Ct. 562 (1988).

64. 393 U.S. 503 (1969).

65. Kuhlmeier v. Hazelwood School Dist., 795 F.2d 1368 (8th Cir. 1986). *See* The Yearbook of School Law 1987 at 96-7.

66. 108 S. Ct. 562, 571 (1988).

views are not inappropriately attributed to the school.[67] Denying students the opportunity to read about sexuality in their school newspaper was, the Court held, a valid pedagogical goal.

Kuhlmeier's effect was immediately observable in lower-court decisions. A Florida district judge concluded that the decision required her to uphold a school board's decision to remove a book containing works by Chaucer and Aristophanes from the school's humanities curriculum.[68] The works, which were optional readings, were found by the school board to contain a level of "sexuality" that was inappropriate for student readers and offensive to community values. While finding it was "difficult to apprehend the harm which conceivably could be caused" by exposing high school juniors and seniors to the authors, the court nevertheless concluded that it was within the school board's power to take the action.

The Ninth Circuit reviewed a decision addressing a school board's policy requiring prior review of all materials that students intended to distribute within the school. The case was initiated when students were officially reprimanded for distributing an unauthorized newspaper at a senior class barbecue. A district court found the review requirement constitutional, holding that it helped prevent disruption and possible damaged reputations.[69]

The Ninth Circuit reversed.[70] The case was, for the appeals court, distinguishable from *Kuhlmeier* because it involved nonschool-sponsored student writings that no one could associate with school sponsorship or endorsement. Using further language from *Kuhlmeier*, the court found that the paper did not interfere with what the school taught and that it enriched the school environment. The appeals court therefore concluded that the school could regulate the time, place, and manner of distribution, but could not require the approval of materials before they were circulated. The case was, for the court, "unique and ironic" because the school defendants admitted that the paper would have qualified for distribution had the review been requested.

A California appeals court reviewed an April Fools Day issue of a faculty-supervised student newspaper after a principal halted the issue when students refused to delete a story and a picture of five students standing in a school line. The spoof said the female students were waiting to be interviewed for possible inclusion in an issue of *Playboy Magazine*. The principal concluded that the students had not given

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67. *Id.* at 569.

68. Virgil v. School Bd. of Columbia County, 677 F. Supp. 1547 (M.D. Fla. 1988).

69. Burch v. Barker, 651 F. Supp. 1149 (W.D. Wash. 1987). *See* The Yearbook of Education Law 1988 at 91.

70. Burch v. Barker, 861 F.2d 1149 (9th Cir. 1988).

informed consent to appear in the gag issue, and at least one of the students supported this contention.

The appeals court sustained the principal's action.[71] The case was not an easy one, even though *Kuhlmeier* supported the decision, because California's education code contains a provision that gives student editors of official school publications virtual control over the contents of papers.[72] The appeals court upheld the censorship, however, relying on the conclusion that materials that are defamatory can be removed. This conclusion was reached after a long discussion of defamation cases, with the court finding that only materials addressing public figures were exempt from the ruling.

The appeals court admitted that its decision created a burden on school peronnel, first requiring the drafting of careful procedures and then the making of difficult judgments. The court added that the plaintiff had missed the chance to pursue a "possibly winning" argument by failing to argue on appeal that the spoof could not possibly be considered defamatory by any reasonable reader. This left the school district's defamation defense unchallenged.

The policy of an Illinois school district prohibiting the wearing of earrings by male students was sustained in the face of a free-expression challenge.[73] The policy was formulated to prevent the wearing of gang insignia to school. In upholding the ban, the district court concluded that the antigang rationale was sufficient to sustain the policy in the face of the student's claim that the earring was merely a sign of his "individuality." The court also rejected a gender-based equal protection challenge that centered on the fact that the earring policy applied only to males.

A challenge brought by students who wished to continue the use of a "Johnny Reb" symbol for their school again was before the Fourth Circuit.[74] A district court previously had dismissed the case as frivolous but the Fourth Circuit had ordered the case considered. On remand, the district court supported the principal's decision to end the use of the symbol, which was offensive to black students. In a decision presumably ending the case, the Fourth Circuit upheld the lower court, holding that personal student expression was not curbed by the school's decision to eliminate an unwanted symbol.

Litigation involving the participation of peace activists in "Career Day" activities in Atlanta continued in 1988. The activists were seeking to counter the activities of military recruiters who participated in the school-day activities by having the career of "peace maker" included on

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71. Leeb v. DeLong, 243 Cal. Rptr. 494 (Ct. App. 1988).
72. Cal. Educ. Code § 48907.
73. Olesen v. Board of Educ. of School Dist. No. 228, 676 F. Supp. 820 (N.D. Ill. 1987).
74. Crosby v. Holsinger, 852 F.2d 801 (4th Cir. 1988).

the program. They also sought to distribute materials in guidance offices and on bulletin boards where a wide variety of career-related materials were available. The school superintendent had approved their participation but the action was reversed by the school board following community complaints. In 1987, the Eleventh Circuit upheld a lower-court ruling that the school board had created a nonpublic forum, but that such a forum must be "viewpoint neutral," and remanded the case for a determination about whether the exclusion of the groups was based on the legitimate goals of the program.[75]

On remand, the district court considered the board's action and concluded that the rules it developed for Career Day participation were designed to suppress the point of view being offered by the peace activists.[76] The board's rules sought to exclude the groups through the elimination of anyone who might "criticize or denigrate" a particular career. In looking at the nature of the program, however, the court found that the program's discussion of career alternatives inevitably involved critical discussion of alternatives and that the rule was a "facade" to control valid points of view. The court ordered the groups' participation and further declared that the bulletin boards and guidance offices contained such a variety of materials as to make them open forums where any career-related materials, broadly defined, must be made available.

Sanctions for Student Misconduct

Student discipline cases involving suspension, expulsion, and corporal punishment appear in the sections that follow this one. Misconduct cases that do not involve these penalties are discussed here. Two such cases decided in 1988 involved the removal of students from the National Honor Society (NHS) and a third involved grade reductions for failing to attend after-school study sessions. The final case involved a singing cheerleader who claimed that she lost her right to an education when she was forced to graduate a semester early.

In the first NHS challenge, a school board affirmed a faculty decision that an unwed mother whom they found to have engaged in premarital sex should be removed from the group for violating the membership requirements of leadership and character. The student responded with a federal court suit alleging sex discrimination under title IX of 42 U.S.C. sections 1983 and 1985, claiming that unwed fathers had not been similarly dismissed. Fourteenth amendment equal protection arguments also were advanced.

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75. Searcey v. Crim, 642 F. Supp. 313 (N.D. Ga. 1986), *modified and aff'd*, 815 F.2d 1389 (11th Cir. 1987). See The Yearbook of Education Law 1988 at 89.

76. Searcey v. Crim, 681 F. Supp. 821 (N.D. Ga. 1988).

The district court concluded that the action could not be brought under title IX.[77] The court found that the school district received limited federal aid, in the form of school lunch program assistance and other categorical support. But no federal funds were used to support the school as a whole and therefore no federal dollars even indirectly were used for the NHS programs. The court did leave open the equal protection claims, however, concluding that the case was not ripe for summary judgment on those grounds. The court also urged the parties to avoid the "emotional hyperbole" that had characterized prior briefs in the case.

Students removed from the NHS for having formulas written on the bottom of their calculators during a calculus test appealed an unfavorable lower-court decision to a Florida appeals court.[78] The students had been explicitly instructed not to bring any formulas into the test room. It was clear in the case that the students had not consulted the formulas because each received a "0" grade. Nevertheless, the appeals court found no legal ground on which their expulsion from the group could be challenged, agreeing that they had "violated the spirit and intent" of the examination rules.

A Michigan school district with an unusual rule regarding after-school study sessions was the defendant in a case challenging the school board's authority to establish the policy.[79] Students who were absent from school in excess of three days a semester were required to attend after-school study sessions. Failure to attend resulted in letter-grade reductions. Even students with excused absences were subjected to the policy.

The plaintiff missed five days following a head concussion and failed to attend enough make-up sessions, resulting in diminished grades. The appeals court rejected arguments that the school lacked statutory authority to establish the policy, finding that students who were absent missed the "intangibles" of being in the classroom and that it was permissible to require students to have an alternative classroom make-up experience. Continuing this reasoning, the court also held that the plaintiff had no expectation of a higher grade, since classroom performance was a valid grading criterion and, therefore, could not claim that her grade had been "lowered."

In a case published two years after it was decided, a Kansas cheerleader claimed her rights were violated when she was removed from her position as head cheerleader and "forced" to graduate one semester early.[80] The student had received permission from school officials to

77. Pfeifer v. Marion Center Area School Dist., 700 F. Supp. 269 (W.D. Pa. 1988).
78. Jacob v. School Bd. of Lee County, 519 So. 2d 1002 (Fla. Dist. Ct. App. 1987).
79. Slocum v. Holton Bd. of Educ., 429 N.W.2d 607 (Mich. Ct. App. 1988).
80. Haverkamp v. Unified School Dist. No. 380, 689 F. Supp. 1055 (D. Kan. 1986).

journey to Nashville to record an album. Nevertheless, she was removed from her position as head cheerleader by the teachers who supervised the pep club. The district court hearing this unusual case refused to find that the student had a property interest at stake in her participation in extracurricular activities, citing the preponderance of case law on this point. The court then refused to hold that a hearing was necessary on her removal from the cheerleading squad.

In addition, the court declined to find that the school had violated the student's property rights by not allowing her to remain in school when she had sufficient credits to graduate. The court reasoned that her right to an education ended when she completed the graduation requirements. Other issues raised in the case similarly were dismissed.

Suspensions and Expulsions

Cases concerning exclusionary discipline generally involve both procedural and substantive claims. Courts that are called upon to decide whether students have received adequate procedural due process prior to their removal from school rely on the holdings in *Goss v. Lopez*.[81] *Goss* requires that students receive "oral and written notice of the charges against [the student] and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story."[82] For suspensions in excess of ten days, more due process is required. While school boards sometime fail to accord adequate procedural due process, especially before expulsion, substantive due process challenges attacking the rules themselves are almost never successful.

Cases in this area in 1988 continued a trend seen in recent years, with most resulting from actions taken against students accused of alcohol or other drug violations. In the cases presented at the outset, courts found procedural errors that nullified school actions.

In the most interesting of these cases, the Sixth Circuit overturned a district court decision and ruled that new evidence could not be introduced during the school board deliberations following an expulsion hearing.[83] The student was accused of possessing marijuana and of selling it to other students. Following the hearing, at which the student's attorney cross-examined school personnel, the superintendent presenting the case told the school board in closed session that a drug counselor had told him the student had confessed his guilt to her. The board then expelled the student for the remainder of the semester.

The drug counselor later submitted an affidavit that she had never

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81. 419 U.S. 565 (1975).
82. *Id.* at 581.
83. Newsome v. Batavia Local School Dist., 842 F.2d 920 (6th Cir. 1988).

made the statement attributed to her by the superintendent. The appeals court held that this key piece of testimony by the superintendent was improperly presented to the board in closed session, where the plaintiff's attorney had no opportunity to rebut the evidence. The case therefore was remanded to the district court for further proceedings.

A student whose school principal would not readmit her until she submitted to corporal punishment brought suit in a Mississippi district court.[84] The student, who was wearing dark glasses contrary to school rules and refused to give them to the principal, initially was suspended for three days for refusing the paddling. Her suspension ultimately lasted for ten days, at which point the school board decided she should be readmitted if she remained another six days, to the end of the school term, in an isolation room within the school.

The issue before the court was whether the isolation room constituted a penalty similar to suspension, in which case the total length of the suspension would exceed ten days and the *Goss* requirement of additional due process would be triggered. The court was unable to reach a conclusion on this issue and on the plaintiff's argument that the school did not enforce the no-sunglasses rule against all students equally. The school district received a summary judgment from the court on all but these two issues, which were held for further arguments.

A rule about drinking "prior to" athletic events was at issue in an Arkansas case.[85] Students who admitted to sharing an alcoholic drink while driving to a football game challenged their one-semester expulsion on the ground that the rule was overly vague. The rule failed to define what "prior to" meant, and testimony by school board members about the rule elicited conflicting definitions, with one member claiming that it meant whatever the board wanted it to mean. This was too much for the court, which held that the rule was overly broad. Damages of $625 were awarded by a jury to each student.

A failure to state the charges prior to an expulsion hearing led an Illinois appeals court to overturn a lower-court ruling upholding the penalty.[86] The letter outlining the student's disciplinary problems was given to his legal counsel the night of the hearing, but did not contain any specific charges. The school board also refused a request for a continuation of the proceedings, unless the student remained out of school. The appeals court held that the student's record contained no information that supported the claim that he should not be in school and remanded the case with instructions that both the charge and the continuation request had been handled incorrectly.

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84. Cole v. Newton Special Mun. Separate School Dist., 676 F. Supp. 749 (S.D. Miss. 1987).

85. Claiborne v. Beebe School Dist., 687 F. Supp. 1358 (E.D. Ark. 1988).

86. *In re* Stratton, 526 N.E.2d 201 (Ill. Ct. App. 1988).

In the last of the cases involving procedural error, a Pennsylvania school district let a student finish his senior year final exams and then sought to expel him on commencement day. The student had been seen selling blotter paper laced with LSD. In spite of the fact that the charges seemed difficult to refute, the appeals court held that the student had a right to his diploma.[87] Pennsylvania law requires districts to issue a diploma to every student who completes the "prescribed course of study," which the student had done by the morning of graduation.

Two federal courts declined to hold that suspensions from school for short periods combined with removal from athletic teams for the rest of the season constituted a denial of substantive due process. In both cases, a court refused to find that a student has a property right that is implicated with dismissal from a sports team. In the first case, the student was suspended for five days and tossed off the baseball team for drinking on a class trip.[88] In the second, a student who had consumed beer and smoked marijuana at a student radio station was suspended for ten days and subsequently removed from the football team.[89] Both sets of penalties were held to be reasonable.

A Florida student challenged her expulsion on a variety of grounds, focusing on the letter she received charging her with possession of "what appeared to be" a marijuana cigarette. She unsuccessfully argued before an appeals court that the charge was overly vague.[90]

The Mississippi Supreme Court found that a student had received the "barest minimum" of due process in her expulsion for giving students Valium in school.[91] The record in the case indicated that the student, who had taken the drug from her grandmother, was expelled solely on the basis of testimony from other students, some of which conflicted. The court held, however, that there was sufficient evidence to support the expulsion.

Corporal Punishment

Corporal punishment in public schools has been held to be constitutional by the United States Supreme Court in jurisdictions where state law and local board policy permit.[92] The local policies establish the way in which the punishment is administered. Constitutional claims that excessive punishment violated a student's fifth or fourteenth amendment

87. Shuman v. Cumberland Valley School Dist., 536 A.2d 490 (Pa. Commw. Ct. 1988).
88. Katchak v. Glasgow Indep. School Sys., 690 F. Supp. 580 (W.D. Ky. 1988).
89. Palmer v. Merluzzi, 689 F. Supp. 400 (D.N.J. 1988).
90. Walter v. School Bd. of Indian River, 518 So. 2d 1331 (Fla. Dist. Ct. App. 1987).
91. Jones v. Board of Trustees of Pascagoula, 524 So. 2d 968 (Miss. 1988).
92. Ingraham v. Wright, 430 U.S. 651 (1977).

substantive due process rights are seldom successful, with courts instead directing plaintiffs toward filing state-court tort claims. The four corporal-punishment cases decided in 1988 all raised substantive due process claims, but only one was successful.

A sixth-grade student was hit twice with a paddle administered by a coach after he was found playing dodge ball when he had been told not to. The punishment was administered after two warnings and was meted out at the end of a recreation period in the presence of two witnesses. The student's doctor found no evidence of serious injury, but the student's father filed suit in federal court claiming a substantive due process violation. After a lower court issued a summary judgment in favor of the school system, the father appealed to the Eighth Circuit. The appeals court concluded that "minor discomfort and hurt feelings do not make a federal case," finding that there was no evidence that the punishment was inflicted with malicious or sadistic intent.[93]

"Snickering" kindergarten students were paddled twice, first by the principal and then by their teacher, when they refused to halt the behavior. After the second paddling they missed six days of school and suffered bruises that child welfare officers characterized as evidence of "child abuse." In spite of their injuries, the Fifth Circuit Court of Appeals refused to find that they suffered a violation of their substantive due process rights.[94] The appeals court felt bound by previous decisions in the circuit that held that state common-law remedies should be pursued when punishment is thought to be excessive.

The court also concluded it would not find the Texas law on corporal punishment to be unconstitutional, in spite of research presented by the plaintiffs that paddling was counterproductive and "irrational." The court held that the law had a rational basis and that calls for its repeal should be directed to the legislature.

Actions that involve the *ad hoc* administration of a punishment cannot be called "corporal punishment" simply because the intent is to control student behavior. In a case illustrating this point, a Pennsylvania student who was heard using inappropriate language during a physical education class was grabbed from behind by a gym teacher who then lifted the student in the air while keeping an arm across the student's throat. The student lost consciousness and suffered a broken nose and other serious injuries when the teacher released him and he fell to the floor.

A district court dismissed all the claims made by the student's parents. On appeal, the Third Circuit reversed, holding that the parent's

93. Wise v. Pea Ridge School Dist., 855 F.2d 560 (8th Cir. 1988).
94. Cunningham v. Beavers, 858 F.2d 269 (5th Cir. 1988).

substantive due process and state claims should be heard.[95] The appeals court concluded that a hearing might well lead to the conclusion that the treatment served "no disciplinary purpose." In dissent, one judge argued that not enough evidence of a constitutional violation had been presented and that state-court remedies alone should be pursued.

A Louisiana kindergarten student received a paddling from a vice-principal, and her parents later filed suit claiming that the penalty was excessive. In an unusual turn of events, the family's doctor testified that it was highly unlikely that the paddle had caused the bruise, concluding that it had come from a belt or stick. Under these circumstances, an appeals court concluded that it was not unreasonable for a lower court to dismiss the case.[96]

DESEGREGATION

Litigation involving desegregation continued to decline in volume in 1988, caused by rulings in previous years that school districts had attained unitary status and no longer required court supervision of outstanding injunctions or consent decrees. The cases that were decided in 1988 focused principally on two issues—the responsibility of states to pay enormous sums to remedy past segregation, and the claims by school boards that their districts should be removed from court supervision. A major case arguing attorneys' fees also was heard.

Cross-district Remedies

In a case of relatively recent inception, compared with most desegregation disputes that have a thirty-year history, the Second Circuit affirmed a lower-court decision ordering the Yonkers, New York, school board and the city of Yonkers to take steps to desegregate that city's schools.[97] The remedies required by the decision include the establishment of magnet schools, the construction of 200 federally funded public housing units outside existing minority neighborhoods, and payment by the city for the desegregation plan. In affirming the lower court, the appeals court found that the lower court had not erroneously concluded that both the city and the board were responsible for existing segregation.

The board had failed to address segregation on several occasions, even when presented with plans that would have done so. Likewise the city, which controls school budgets and the composition of the school board through mayoral appointments, failed to take action. While the defendants argued there had been no showing that racial factors were

95. Metzger v. Osbeck, 841 F.2d 518 (3d Cir. 1988).
96. Abraham v. LaFayette Parish School Bd., 534 So. 2d 49 (La. Ct. App. 1988).
97. United States v. Yonkers Bd. of Educ., 837 F.2d 1181 (2d Cir. 1987).

the "dominant" factor in causing the governmental actions, the appeals court held that a finding that such motives were "significant" was sufficient. While the city and the board attempted to blame each other for the problem, the appeals court ruled that both were at fault.

The issue of which agency should pay for desegregation was argued in several cases heard by federal courts of appeal. In the first, the Sixth Circuit heard an appeal from a decision by a district court ordering Tennessee to pay 60% of Nashville's integration costs. While states traditionally are parties at the start of desegregation cases, Tennessee was added to this case in 1981, twenty-six years after the litigation commenced. In 1985, the district court concluded that the state had an obligation to pay the 60% share, starting in 1981 when the state was added as a party.[98] The state appealed, arguing that the principle of sovereign immunity precluded its liability.

The appeals court viewed the order for state payment through the lens provided by *Milliken v. Bradley*.[99] In *Milliken* the Court ordered state participation in funding a desegregation remedy, carving an exception to the doctrine of sovereign immunity by holding that federal courts could force state officials to conform to federal law even if the action had a substantial effect on a state's treasury. The appeals court concluded, however, that parallels between the role of the state in the Nashville case and that of the state in *Milliken* were quite different. In looking at the extent of Tennessee's involvement, the appeals court said it had "searched the record of this case in vain for any demonstration that the integration of metropolitan Nashville's schools had been wrongfully impeded by anything the state has done or has failed to do . . . ."[100] Finding no state wrongdoing, the court concluded that the lower court had strayed into an area reserved for elected representatives, and that its decision would "unilaterally rearrange the tax burdens of the people of Tennessee." The appeals court ordered the district court to dismiss the state as a party in the case.

The California legislature and a federal district court were at odds in a dispute involving payment for desegregation in San Francisco.[101] The original federal-court case ended when the parties signed a consent decree wherein the state agreed to fund 100% of the settlement costs. Subsequently, the legislature adopted a bill, characterized by the court as a "nearly incomprehensible statute," that established 1984-85 as a base

98. Kelley v. Metropolitan County Bd. of Educ. of Nashville, 615 F. Supp. 1139 (M.D. Tenn. 1985).

99. 433 U.S. 267 (1977).

100. Kelley v. Metropolitan County Bd. of Educ. of Nashville, 836 F.2d 986, 993 (6th Cir. 1987).

101. San Francisco NAACP v. San Francisco Unified School Dist., 695 F. Supp. 1033 (N.D. Cal. 1988).

year beyond which the state would fund only 80% of the increased cost for the plan. The court rejected the funding reduction, however, holding that the state had entered into a bargain with the parties and could not renege on its commitment. Since the state defendants in the case did not include the legislative branch, state education officials appealed the decision on the ground that they were unable to comply.

The Richmond school board in 1986 failed to convince a federal district court that the state of Virginia should fund remedial and compensatory education programs that the board argued were needed to eliminate the lingering effects of segregation.[102] The board appealed, asserting that the lower court had inappropriately placed the burden of proof on the board once it had concluded that the district had achieved unitary status. Once unitary status is achieved, the burden is on the plaintiffs to prove that official governmental action has contributed to segregation, or resegregation.

The Fourth Circuit Court of Appeals affirmed the district court ruling.[103] The district attempted to argue that the lower court should have expanded the six criteria found in *Green v. County School Board*,[104] the decision that courts follow in deciding if a district is unitary, to include such additional factors as test scores and dropout and graduation rates. The appeals court held, however, that these additional indices did not support the board's position. Looking at state data, the court concluded that students in the mostly black Richmond district did as well or nearly as well as those in other Virginia districts.

The contents of thirteen orders issued from 1986 through part of 1988 by the district court hearing the Kansas City desegregation case were reviewed by the Eighth Circuit.[105] The district court had concluded that the physical facilities in the district had "literally rotted" and had ordered the state to pay $150 million of the cost of the renovations.[106] The court also had ordered a property tax increase to pay desegregation costs in the district after several referenda to increase the levy had failed to get the necessary two-thirds vote, and assessed an income tax on persons who worked in Kansas City but who resided elsewhere. The state and a variety of *amici* parties submitted arguments appealing the sweeping lower-court orders.

The Eighth Circuit affirmed all but the income tax surcharge. The court rejected state claims that the building repair or construction plans

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102. Bradley v. Baliles, 639 F. Supp. 680 (E.D. Va. 1986).
103. School Bd. of the City of Richmond v. Baliles, 829 F.2d 1308 (4th Cir. 1987).
104. 391 U.S. 430 (1968).
105. Jenkins v. Missouri, 855 F.2d 1295 (8th Cir. 1988).
106. Jenkins v. Missouri, 672 F. Supp. 400, 411 (W.D. Mo. 1987). For a discussion of this and other reported decisions in the Kansas City dispute, *see* The Yearbook of Education Law 1988 at 101-2.

were excessive and failed to find that the district court had exceeded its authority in approving them or the magnet plan, which was the other key element of the lower-court decision. On the surcharge, which the appeals court observed had not seriously been proposed by any of the parties in the case, the Eighth Circuit found that the lower court had "invaded the province of the legislature" in ordering the remedy. The court went on, however, to order the state to pay any expenses for the desegregation plan that could not be raised by the school district. The liability of the state in this case flows both from its previous actions that promoted segregation and from state statutes that require extraordinary votes by the electorate to approve capital bonding and school levy increases.

Similarly controversial district-court orders were heard by the Eighth Circuit in the Little Rock desegregation case.[107] At issue were state funding of compensatory education programs, teacher assignments, school board elections, a court order finding the district to be in contempt for failing to implement a magnet plan, and a request that the district court judge be disqualified from the case. The appeals court addressed the disqualification motion first. Observing that requests to disqualify the judge had come from most of the parties in the case "at approximately the same times that the [d]istrict [c]ourt has ruled for their adversaries on the merits,"[108] the appeals court rejected the request. The court was troubled, however, with the fact that the judge had indicated that he would reject a student-assignment plan prior to holding a hearing on the subject.

The lower court was upheld on the remaining issues, including the variations to be permitted in racial goals established as part of the magnet plan and the question of state funding. While the school district was "technically" in contempt of court for failing to implement the plan speedily, the appeals court reasserted its support for the interdistrict remedy and affirmed a variety of lower-court orders that were designed to hasten its implementation.

As has been the case in recent years, a number of decisions were published in the St. Louis desegregation case. While the outline of a settlement had been agreed to in the long-standing dispute, involving partial state payment for interdistrict transfers to magnet schools and capital improvements, the parties appear to be unable to resolve any desegregation details without resorting to litigation. State funds provide the financial incentive for several county districts to participate in the regional plan.

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107. Little Rock School Dist. v. Pulaski County Special School Dist. No. 1, 839 F.2d 1296 (8th Cir. 1988).

108. *Id.* at 1302.

In the first case, Missouri sought to make no payment for interdistrict transfers in excess of the 25% enrollment goal set forth in the plan.[109] The district court concluded that the original goal set forth in the settlement, subsequently approved by the Seventh Circuit, was not intended to be precise, and that a 10% leeway should be allowed. The state was ordered to send the contested dollars to the six school districts participating in the magnet program.

In a separate case, the state objected to the granting of a time extension to one of the participating school districts so that it would have additional time to meet its majority-minority target ratio. The time extension had the effect of continuing the state's funding obligation for the additional period. The court found the state's objections to be without merit and approved a two-year extension.[110]

The St. Louis desegregation remedy includes both interdistrict and intradistrict magnet schools. Following remand from the Eighth Circuit which approved this general approach,[111] the district court in 1988 rendered a decision that specified in exacting detail how the desegregation plan should be implemented.[112] Of greatest interest in the case, the district court adjusted the funding formula for the magnets such that there would be an increased incentive on the parties to reach the target goals. The decision also addressed such details as the location of magnets and faculty-student ratios.

Finally, the Eighth Circuit addressed a minor issue in the protracted St. Louis case, affirming a lower-court decision that rejected attempts by the St. Louis NAACP to obtain resident student data from county school districts.[113] The data were sought to permit comparisons between the students who had transferred into the district as the result of the desegregation plan with those students who already resided there. The data were requested to support the contention that the transferring minority students were being treated differently from those who resided in the district. While affirming the lower court, the appeals court did remand the case so the district court could require that better data be supplied on the transfer students themselves.

Desegregation Plan Oversight

Cases involving the monitoring of desegregation by federal courts fall into three general groups. The most routine group of cases involves challenges to school system plans to modify a desegregation plan in

109. Liddell v. Board of Educ., St. Louis, 686 F. Supp. 235 (E.D. Mo. 1988).
110. Liddell v. Board of Educ., St. Louis, 687 F. Supp. 1368 (E.D. Mo. 1988).
111. Liddell v. Board of Educ., St. Louis, 801 F.2d 278 (8th Cir. 1986).
112. Liddell v. Board of Educ., St. Louis, 696 F. Supp. 444 (E.D. Mo. 1988).
113. Liddell v. Board of Educ., St. Louis, 851 F.2d 1104 (8th Cir. 1988).

some way, such as changing school assignments or constructing new facilities. Second, oversight litigation sometimes focuses on the question of whether a district has achieved unitary status and should be freed from court supervision. Finally, a smaller group addresses the issue of whether cases that have been closed should be reopened. All three types of cases were heard in 1988.

The standards and procedures that district courts use in deciding whether a system is unitary vary from circuit to circuit. The procedures must be followed, however, as was seen in the appeal of a decision made by a Louisiana district court. The district court had held that a system had attained unitary status, but issued the ruling on unitary status without holding a hearing. The plaintiffs in the case argued that the action was precipitous and the Fifth Circuit Court of Appeals agreed.[114] The appeals court reviewed its prior decisions that require three years of reporting by the school system to the district court about desegregation progress. A hearing then must be held on the motion for unitary status. Because these steps were not followed, the lower-court's action was reversed. The appeals court found no fault, however, with the lower-court ruling that the consolidation and construction plans proposed by the district should be approved.

The question of whether a school district can be declared to have reached unitary status while it still is under the control of previous court injunctions has been argued several times in recent years. The issue was raised again in a 1987 Oklahoma City desegregation case. In 1977, a district court ruled that Oklahoma City schools were unitary and the decision was not appealed. In 1985, the plaintiffs sought to reopen the case to argue that a pupil-assignment plan would lead to further segregation. The district court refused but the case was remanded by the Tenth Circuit.[115] The appeals court held that a system could not be unitary until the district court had dissolved the desegregation decree under which the school system was operationg. The appeals court also placed the burden of proof on the school board to show that its pupil-assignment plan was not in violation of the original desegregation decree.

The district court addressed these issues in an opinion handed down late in 1987.[116] After reviewing data showing that the district had seen a sharp increase in its enrollment of minority students over the seventeen years since the litigation commenced, the court weighed the question of whether the district's actions had contributed to increased segregation. The court concluded that residential segregation rather than board action was responsible. The court also held that the challenged assign-

114. Monteilh v. St. Landry Parish School Bd., 848 F.2d 625 (5th Cir. 1988).
115. Dowell v. Oklahoma City Pub. Schools, 795 F.2d 1516 (10th Cir. 1986).
116. Dowell v. Oklahoma City Pub. Schools, 677 F. Supp. 1503 (W.D. Okla. 1987).

ment plan implemented by the board for grades K-4 had provided parents with additional involvement with their local schools. The court ruled that the alternative proposed by the plaintiffs need not be considered because the schools had achieved unitary status. In other words, the failure of the court to dissolve the decree was seen as a technical oversight. The court, then, appeared not to follow the appeals court ruling that the burden of proof was on the school board in the remanded case. This approach provides the grist for a subsequent appeal of the decision.

Several 1988 cases argued pupil-assignment plans proposed by districts under court supervision. Parents of children who were denied a school transfer filed suit in North Carolina.[117] Minority children were given the opportunity to request transfers but majority pupils were not, thereby increasing desegregation in elementary schools. The parents of nonminority children claimed that the district's policy violated their equal-protection rights, but the district court held that the system had "broad discretion" in establishing policies that furthered desegregation. The court declined to consider whether the district had attained unitary status, concluding that its decision in the case at hand would be the same in either case.

The decision by the Fort Worth, Texas board to discontinue busing to achieve desegregation was heard by a district court.[118] In the thirty years since the case was initiated, Fort Worth schools have become increasingly filled with minority students, and busing has been reduced to cover only second and third graders enrolled in nineteen cluster schools. The busing involved schools at opposite ends of the city, with the longest rides taking more than three hours each day. While the end of busing would increase school segregation, the court found that the burden on children and parents was so great that the decision to stop the busing was not improper.

A district court decision approving a pupil reassignment plan in San Jose was approved by a California district court and the decision was appealed. The plaintiffs argued that the plan placed a disproportionate burden on minority children. The Ninth Circuit disagreed, however, finding that more than 90% of children from all races had been granted their first-choice request for the school they wished to attend.[119] The appeals court also refused to find that the plan had a disproportionate impact on minority children because a slightly greater percentage of minority children would be forced to attend their second-choice schools.

The use of achievement tests to place students was alleged to further

117. Pleasant v. Stanly County Bd. of Educ., 690 F. Supp. 1478 (M.D.N.C. 1988).
118. Flax v. Potts, 680 F. Supp. 820 (N.D. Tex. 1988).
119. Diaz v. San Jose Unified School Dist., 861 F.2d 591 (9th Cir. 1988).

school segregation in Starkville, Mississippi. The tests were used only for English and mathematics course sections in elementary schools. Student assignments in other subjects were made without using tests. The plaintiffs in the case argued that the test was resulting in a disproportionate number of one-race class sections. A district court ruled that the achievement grouping had only a "minimal segregative effect" and that the practice could continue. The plaintiffs appealed to the Fifth Circuit and the lower court decision was sustained.[120]

In a brief opinion, the appeals court concluded that actual student achievement, as opposed to hypothetical "ability" factors, could be used in making placement decisions that afforded better educational opportunities for all children. Similarly, the appeals court upheld the criteria used by the district to assign students to gifted and talented programs, wherein the student name, race, and grades were not known to judges who reviewed student work to determine who would be admitted.

The availability of minority-group teacher candidates was argued before the Eighth Circuit in a case originating in Nashville, Arkansas.[121] The case also involved claims of disproportionately severe treatment of minority students and segregation in school activities. When a district court rejected all of the plaintiffs' claims, an appeal was taken. The appeals court sidestepped the question of disparate treatment, agreeing that many of the plaintiffs' claims were left undisputed. The appeals court held, however, that it would render no finding on the matter, leaving it to the plaintiffs to petition the district court again if the practices became "onerous." On the failure of the distict to employ more minority teachers, whom the district argued were not available in the area, the appeals court remanded the issue to the district court for a determination of the relevant labor market. The appeals court hinted that the relevant market might include more than the candidates available in the immediate area.

Finally, in a baffling case that eventually led all parties in a desegregation dispute to join in fighting the federal government, the United States was unsuccessful in getting a federal court to declare that nine school districts had achieved unitary status.[122] There had been no activity in the litigation involving the districts since 1974, though permanent injunctions remained in effect. In 1988, however, in what the district court characterized as "an apparent effort to rid itself of inactive case files," the federal government filed a motion to have the systems declared unitary. Both the original plaintiffs and the defending school boards ultimately concluded that they would rather leave the injunctions

120. Montgomery v. Starkville School Dist., 854 F.2d 127 (5th Cir. 1988).
121. Scoggins v. Board of Educ. of Nashville, Ark., 853 F.2d 1472 (8th Cir. 1988).
122. United States v. State, 691 F. Supp. 1440 (M.D. Ga. 1988).

intact, rather than go through the expense of participating in court hearings on the unitary status motion. The district court concluded that the United States had status as an original participant in the case to make the motion, but the court held that the federal government would have to bear the entire cost of proving that each district had attained unitary status plus the cost of representing all nine unwilling school boards in the action.

State Court Cases

The Supreme Court of Kansas confronted the question of whether the Kansas Commission on Civil Rights had jurisdiction to investigate complaints involving alleged public school discrimination. The commission had been asked to investigate the student transfer policies in several school districts where it was alleged that the policies discriminated on the basis of race. A lower-court judge refused to enforce subpoenas issued by the commission and an appeal was taken.

For the Kansas high court, the issue was one of statutory interpretation.[123] The commission's powers applied to public accommodations, housing, and employment. While it had attempted to consider schools to be places of public accommodation, the court concluded that a clear reading of the statute led to the conclusion that only businesses could be places of public accommodation. The court therefore ruled that the commission had usurped legislative prerogative by attempting to expand its powers.

Attorneys' Fees

Attorneys' fees totaling more than $4 million in the Kansas City school desegregation case were disputed before the Eighth Circuit Court of Appeals.[124] When the dust settled, the district court's awards were left unchanged by the appeals court. An appeal has been made to the Supreme Court.

The state of Missouri contested the fee award, alleging that the plaintiffs had achieved only "partial success" and that hourly rates for attorneys had been improperly calculated. They also argued that the school board had responsibility for some of the fees, while the board in turn argued that it was entitled to fees from the state. The appeals court viewed the issue following the admonition in *Hensley v. Eckerhart*[125] that the fee issue should not result in a "second major litigation." In so

123. Commission on Civil Rights v. Topeka Unified School Dist., 755 P.2d 539 (Kan. 1988).

124. Jenkins v. Missouri, 838 F.2d 260 (8th Cir. 1988).

125. 461 U.S. 424 (1983).

doing, the court at several points announced that it might have reached a different conclusion, but that the action taken by the district court was not clearly erroneous. The fees covered the period from 1979 through part of 1986.

In sustaining the decision that the state must pay, the appeals court observed that the district had admitted its liability in the desegregation case, but that the state had denied its responsibility throughout a more than ten-month trial. The court also refused to upset the lower-court ruling that fees need not be divided among the parties in the same percentages as the cost for the desegregation plan implementation. While the plaintiffs argued that there should be a fee enhancement to reward them for litigating on a contingency basis, the lower court ruling denying this request was allowed to stand.

4

HANDICAPPED

Nelda H. Cambron-McCabe

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INTRODUCTION

Litigation of handicapped students' and employees' rights continued at a significant level in 1988. Requests for attorneys' fees under the Handicapped Children's Protection Act was the focus of the greatest number of cases. As in 1987, two major issues were raised in these cases: the availability of fees for administrative hearings and the constitutionality of the retroactive application of the law.

The most widely-publicized case was the United States Supreme Court's decision in *Honig v. Doe*.[1] In addressing the expulsion of a handicapped student, the Court held that unilateral exclusion in excess of ten days for conduct related to the student's disability is a prohibited change in placement under the Education of the Handicapped Act (EHA). The Court declined to recognize a "dangerousness" exception to the stay-put requirement.

ENTITLEMENT TO SERVICES

The judiciary continues to address the level of educational services students must be provided under the EHA. The United States Supreme Court has not prescribed a specific substantive educational standard but rather stated that an educational program should be sufficient to confer some educational benefit, that is, "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child."[2] Relying on the Supreme Court's interpretation of the EHA and the frequent references in the statute and legislative history to "full educational opportunity," the Third Circuit Court of Appeals concluded that more than *de minimus* benefit is required.[3] The court held that *some benefit* "connotes an amount of benefit greater than mere trivial advancement."[4] Because it appeared that under the federal district court's ruling in this case that *any benefit* would constitute an appropriate education, the case was remanded.

States are required to provide special education services to students eighteen years and older only if they provide programs for nonhandicapped students in that age group. A Nebraska parent claimed that his son was entitled to be educated until he reached twenty-two years of age. While the court recognized that the EHA language could be read as inclusive, deferrence to state law restricted enrollment. Nebraska law provides that students will be educated "to age twenty-one," which the court interpreted as "until" age twenty-one.[5] Similarly, the Supreme Court of Wyoming held that neither state nor federal funds could be used for educational programs after a student reached the age of twenty-one.[6]

Handicapped children with Acquired Immune Deficiency Syn-

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1. 108 S. Ct. 592 (1988).
2. Board of Educ. of the Hendrick Hudson Cent. School Dist. v. Rowley, 458 U.S. 176, 200 (1982).
3. Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3d Cir. 1988).
4. *Id.* at 183.
5. Monahan v. School Dist. No. 1 of Douglas County, 425 N.W.2d 624 (Neb. 1988).
6. Natrona County School Dist. No. 1 v. Ryan, 764 P.2d 1019 (Wyo. 1988). *See also* Natrona County School Dist. No. 1 v. McKnight, 764 P.2d 1039 (Wyo. 1988); State v. Cochran, 764 P.2d 1037 (Wyo. 1988).

drome (AIDS), AIDS-Related Complex (ARC), or the Human T-Lymphotropic Virus (HTLV-III) are entitled to receive special education services. In granting a preliminary injunction, an Oklahoma federal district court held that a state law regarding contagious diseases could not be used to bar the attendance of an emotionally disabled child who tested positive for the HIV virus; EHA pre-empts state law.[7] A Florida federal district court, however, denied a motion for a preliminary injunction to admit an incontinent, trainable mentally handicapped child diagnosed as having ARC.[8] The court concluded that the plaintiffs did not establish the likelihood that they would succeed on the merits of the case at trial and failed to show that the harm to the child caused by the denial of attendance outweighed the potential harm to others.

PROCEDURAL SAFEGUARDS

Extensive procedural safeguards are identified in the EHA to ensure that all handicapped students receive a free appropriate public education (FAPE) through proper identification, evaluation, and placement. The Fourth Circuit Court of Appeals has noted that "failures to meet the Act's procedural requirements are adequate grounds by themselves for holding that a school board failed to provide a FAPE."[9] Prior to the evaluation of a child, parents must be informed of their procedural rights, including a description of the process and procedures, and of the right to an impartial due process hearing to present complaints. After approval of the individualized education program (IEP), any changes in the program also must be preceded by procedural safeguards. The judiciary continues to interpret specific procedural rights and assess school officials' compliance with the Act.

Rights of Parents and Guardians

According to the Supreme Court, the individualized education program is the "centerpiece" of the EHA's procedural scheme.[10] This mechanism ensures parental participation in the development of a student's educational program. The Third Circuit Court of Appeals, however, noted that the procedural protection exists only "if the state devises an *individualized* program and is willing to address the handicapped child's

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7. Parents of Child, Code No. 870901W v. Coker, 676 F. Supp. 1072 (E.D. Okla. 1987).

8. Martinez v. School Bd. of Hillsborough County, Fla., 675 F. Supp. 1574 (M.D. Fla. 1987). At trial, however, the district court ruled that the child must be served in the public school but with certain restrictions. *See* text with note 49, *infra*.

9. Board of Educ. of Cabell County v. Dienelt, 843 F.2d 813, 815 (4th Cir. 1988), *quoting* Hall v. Vance, 774 F.2d 629, 635 (4th Cir. 1985).

10. Honig v. Doe, 108 S. Ct. 592, 598 (1988).

unique needs.'"[11] Parents in this case claimed that their child was denied an appropriate education because a local school district policy did not permit, under any circumstances, direct physical therapy. Concluding that a rigid rule would interfere with a child's procedural rights, the appellate court remanded the case for further inquiry.

To assure a child a free appropriate public education, parents must be involved in the development of the IEP. The Fourth Circuit Court of Appeals held that a Virginia school district violated the EHA procedures by determining a child's placement and then developing an IEP to support the decision.[12] In the court's words, such an action violates the "spirit and intent" of parental involvement required in the EHA.

Parents must be informed of changes in a child's educational program. The District of Columbia Court of Appeals found that the suspension of instruction to a handicapped student because of health problems without notifying the surrogate parent violated the EHA.[13] The failure of the parent, however, to pursue administrative remedies after notification prevented recovery of relief for any deprivations from that date.

The Eighth Circuit Court of Appeals reaffirmed that parents may challenge EHA due process procedures of local and state agencies under 42 U.S.C. section 1983.[14] The Handicapped Children's Protection Act of 1986 firmly established that the EHA is not the exclusive means of enforcing handicapped children's rights.[15] A New York federal district court also granted a motion to amend a claim for damages under section 1983.[16]

Change in Placement

If parents desire a change in their child's placement, they must initiate a change. In an Eighth Circuit Court of Appeals case, the school officials and parents had agreed that a change in placement was needed, but the school district was never given an opportunity to propose an alternative placement.[17] There was no evidence to indicate that the school officials were unwilling to consider a range of placement options, including out-of-state residential schools. Accordingly, the appellate court ruled that the parents assumed the financial risk for the unilateral change.

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11. Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 177 (3d Cir. 1988).
12. Spielberg v. Henrico County Pub. Schools, 853 F.2d 256 (4th Cir. 1988).
13. Abney v. District of Columbia, 849 F.2d 1491 (D.C. Cir. 1988).
14. Digre v. Roseville Schools Indep. Dist. No. 623, 841 F.2d 245 (8th Cir. 1988).
15. 20 U.S.C. § 1415.
16. Hiller v. Board of Educ. of Brunswick Cent. School Dist., 687 F. Supp. 735 (N.D.N.Y. 1988).
17. Evans v. District No. 17 of Douglas County, Neb., 841 F.2d 824 (8th Cir. 1988).

A Michigan federal district court held that a school district is entitled to evaluate a child prior to recommending a change in placement but is not required to leave the state to conduct such an evaluation when parents have unilaterally removed the child.[18] The court rejected the parents' contention that only the evaluations supplied by a private school should be considered.

Although a District of Columbia child was not appropriately placed in a public school program and placement in a private school was held to be appropriate, the federal district court denied parents' request that the school district be prohibited from changing the placement for two years.[19] Under the EHA, a school district is required to review each handicapped child's IEP annually.

The "stay put" or "status quo" rule of the EHA provides that "[d]uring the pendency of any proceedings conducted . . . unless the state or local educational agency and the parents or guardian otherwise agree, the child shall remain in the current educational placement . . . ."[20] The statute ensures that prior to the completion of the administrative and judicial review children will not be removed either from a regular classroom or a special education program over the parents' objection.

Courts assessing the stay put requirement in 1988 relied extensively on the United States Supreme Court's interpretation of the provision in *Honig v. Doe*.[21] Specifically, they referenced the Court's finding that the language of section 1415(e)(3) is "unequivocal"—"the child *shall* remain in the then current educational placement."[22] In denying an exception to the stay-put mandate even for students who are violent or dangerous, the Court further elaborated:

> We think it clear . . . that Congress very much meant to strip schools of the *unilateral* authority they had traditionally employed to exclude disabled students . . . from school. In so doing, Congress did not leave school administrators powerless to deal with dangerous students; it did, however, deny school officials their former right to "self-help," and directed that in the future the removal of disabled students could be accomplished only with the permission of the parents or, as a last resort, the courts.[23]

In construing the meaning of the stay put requirement, courts are frequently asked to determine which placement is a child's "current educational placement." In a District of Columbia case, the current

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18. Lenhoff v. Farmington Pub. Schools, 680 F. Supp. 921 (E.D. Mich. 1988).
19. Kattan v. District of Columbia, 691 F. Supp. 1539 (D.D.C. 1988).
20. 20 U.S.C. § 1415(e)(3).
21. 108 S. Ct. 592 (1988). *See* text with note 83, *infra*.
22. *Id.* at 604.
23. *Id.*

educational placement, a private day school, was unavailable for the 1987-88 school year.[24] The parents objected to the public school program recommended by the school district and chose to enroll their son in another private school. The federal district court held that where the current placement is not available a district must locate a "comparable and appropriate program," which in this case was a private education facility. The district's failure to provide such an option during the pendency of review violated the EHA. Consequently, the program selected by the parents was found to be appropriate and the placement proposed by the district was not.

The Eighth Circuit Court of Appeals concluded that the current educational placement of a child who had been classified as handicapped and subsequently attended school in another district for one month in the regular education program was still the special education program when he returned to the district.[25] The parent argued that his current placement was the regular classroom because he was transferring into the district as a regular student. The court held that his history as a special education student within the school district dictated his placement during the pendency of the review process to determine an appropriate placement.

In the first case at the federal level to address whether graduation is a change in educational placement, a New York district court agreed with the Massachusetts high court that it "can hardly be characterized as anything other than a change in placement."[26] The school district argued that the student did not qualify for the protection of the EHA because he had been issued a diploma. The parents disagreed and requested an impartial hearing, claiming that their son was not properly graduated. Concluding that graduation is a change in placement, the court held that a violation of the stay put requirement justified an automatic preliminary injunction.[27] While the court found it unnecessary to apply the traditional standard for granting injunctive relief, it stated that the same results would have been reached because the student could show irreparable harm and the likelihood of success on the merits of the claim.

A California federal district court initially denied a preliminary injunction against the unilateral change in a child's educational and residential placement through termination of the child's funding at the

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24. Knight v. District of Columbia, 691 F. Supp. 1567 (D.D.C. 1988).

25. Digre v. Roseville Schools Indep. Dist. No. 623, 841 F.2d 245 (8th Cir. 1988).

26. Cronin v. Board of Educ. of East Ramapo Cent. School Dist., 689 F. Supp. 197, 203, *quoting* Stock v. Massachusetts Hosp. School, 467 N.E.2d 448, 453 (Mass. 1984).

27. In a footnote, the court commented that the pendency provisions of the EHA could not be avoided by a school district graduating students. Failure to accept that position would render the stay put provision meaningless; school districts could simply terminate services by the conferral of diplomas.

Behavior Research Institute of California, Inc. (BRI), a residential community care facility.[28] The court based its denial on the lack of evidence that the placement was made for educational purposes. In granting reconsideration of the order, the court invoked the stay put provision and issued a preliminary injunction restraining the Department of Social Services and a nonprofit community agency from altering the child's placement during the pendency of the hearings.[29] Subsequently, in a third case, the Department of Social Services, attempting to revoke the license of BRI, requested clarification of the court's preliminary injunction order, and BRI at the same time urged the court to interpose the preliminary injunction to prevent revocation of its license.[30] The court recognized the authority of the Department of Social Services to determine independently the adequacy of private institutions to provide services without the necessity of providing prior notice and a hearing to parents. Such a determination is not directed toward a specific individual. The court, however, did caution that the Department of Social Services could not use revocation of BRI's operating license as a means to change this specific child's placement.

Administrative Remedies

If parents disagree with the placement of their child or any aspect of the educational program, they can request an impartial due process hearing. The hearing may be conducted by the local school district, the state agency, or an intermediate agency. The statute prohibits employees of units who are involved in the education of the child from serving as hearing officers. Two courts, joining a growing number of courts, also held that employees of the state education agency are not eligible to conduct reviews. The Third Circuit Court of Appeals reasoned that the secretary of education is an employee with extensive fiscal and regulatory control over local school districts and, therefore, unable to conduct impartial reviews.[31] Similarly, a New York federal district court in granting a preliminary injunction, concluded that the commissioner of education is not a constitutional officer but an employee. As such, parents were likely to prevail on the claim that they were denied an impartial hearing.[32]

The Second Circuit Court of Appeals found a New York two-tier

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28. Corbett v. Regional Center for the East Bay, Inc., 676 F. Supp. 964 (N.D. Cal. 1988).

29. Corbett v. Regional Center of the East Bay, Inc., C-87-5322 SAW, discussed at 699 F. Supp. 230 (N.D. Cal. 1988).

30. Corbett v. Regional Center of the East Bay, Inc., 699 F. Supp. 230 (N.D. Cal. 1988).

31. Muth v. Central Bucks School Dist., 839 F.2d 113 (3d Cir. 1988). *See also* Burr v. Ambach, 863 F.2d 1071 (2d Cir. 1988).

32. Holmes v. Sobol, 690 F. Supp. 154 (W.D.N.Y. 1988).

state review process inconsistent with the EHA.[33] After an initial hearing by a review officer appointed by the state educational agency, review by the commissioner of education was held to be improper.[34]

The District of Columbia Court of Appeals concluded that courts must give deference to a hearing officer's decision.[35] While the court noted that less deference may be required because of courts' authority to supplement the proceedings with additional evidence, courts should not substitute their judgment. The court advanced a formula for the district court to apply on remand: "that a party challenging the administrative determination must at least take on the burden of persuading the court that the hearing officer was wrong, and that a court upsetting the officer's decision must at least explain its basis for doing so."[36]

Under the EHA, parents or guardians must exhaust administrative procedures prior to seeking judicial review of educational placement or services decisions. Three federal district courts declined to review claims because parents had failed to invoke the available administrative procedures.[37] In one of the cases, the parents maintained that exhaustion was not required because the suit also was filed under 42 U.S.C. section 1983, which does not require exhaustion before judicial consideration.[38] Relying upon section 1415(f) of the EHA, the court rejected this argument, noting that the statute requires that prior to claims under other laws providing relief similar to the EHA individuals must exhaust the EHA administrative remedies.

Exhaustion of administrative remedies is not required if such an attempt would be futile.[39] The Ninth Circuit Court of Appeals found it unnecessary for a parent association seeking adequate funds to continue the educational programs in a private facility to pursue a due process hearing.[40] Initially, the plaintiffs requested and were denied a hearing from both the local school district and the state agency responsible for administering state funds. Maintaining that exhaustion of administrative remedies was still required prior to judicial review, the state argued that

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33. The EHA provides that states may establish a one-tier or two-tier review system. Under a one-tier system, an impartial hearing is conducted by the state educational agency. Under a two-tier system, a local hearing is conducted and the losing party may appeal to the state level.

34. Burr v. Ambach, 863 F.2d 1071 (2d Cir. 1988). *See also* Antkowiak v. Ambach, 838 F.2d 635 (2d Cir. 1988) (expressed doubt about the extra procedural step in the New York administrative review procedures).

35. Kerkam v. McKenzie, 862 F.2d 884 (D.C. Cir. 1988).

36. *Id.* at 887.

37. Browning v. Evans, 700 F. Supp. 978 (S.D. Ind. 1988); Laura V. v. Providence School Bd., 680 F. Supp. 66 (D.R.I. 1988); Secor v. Richmond School Joint Dist. No. 2 Lisbon-Pewaukee, 689 F. Supp. 869 (E.D. Wis. 1988).

38. Laura V. v. Providence School Bd., 680 F. Supp. 66 (D.R.I. 1988).

39. *See* Honig v. Doe, 108 S. Ct. 592 (1988).

40. Kerr Center Parents Ass'n v. Charles, 842 F.2d 1052 (9th Cir. 1988).

the role of the court should be to order an administrative hearing, not consider the merits of the case. The court rejected this assertion, concluding that the parents did pursue the specified procedures and, furthermore, a hearing would be useless since the lack of financial resources could not be adequately considered in the administrative process.[41]

The Fourth Circuit Court of Appeals ruled that a parent was not required to reexhaust administrative remedies when the school district changed its proposed placement.[42] The parent's original request to have her child placed in a neighborhood school was not affected by the district's new proposal. While the new program was not reviewed in the administrative hearings and ordinarily would require remand, the court noted that under the EHA courts may hear new evidence, negating the necessity for reexhaustion. Similarly, the District of Columbia Federal District Court held that parents are not required continually to initiate a new administrative review for each school year while they are in the midst of pursuing administrative proceedings.[43] The court stated that the school system's "draconian view of the system would consign plaintiffs to multiple hearings and a never-ending series of conflicts."[44]

An Illinois federal district court ruled again in 1988 that EHA and its administrative remedies apply to AIDS victims "*only* if their physical condition is such that it adversely affects their educational performance."[45] In this case, the student, who was being taught under an individualized education program in a special education program, requested declaratory and injunctive relief against the school district after being placed in a separate modular classroom. The court held that exhaustion of administrative remedies was not required because the student's learning and behavioral problems were not related to his health condition, which prompted the separation from other students. AIDS alone is not a handicap under the EHA.

PLACEMENT

After agreement is reached on a child's IEP, an appropriate placement must be made at public expense. Alternative placements may include a regular classroom with support services, a regular classroom

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41. While the issue of whether parents had exhausted their administrative remedies had been resolved below, a New York appellate court reaffirmed on appeal that the process may be by-passed when it would be futile. Behavior Research Institute v. Ambach, 535 N.Y.S.2d 465 (App. Div. 1988).

42. DeVries v. Spillane, 853 F.2d 264 (4th Cir. 1988). *See* Yearbook of Education Law 1988 at 113 n.18 (district court had ordered further exhaustion of procedures).

43. Holmes v. District of Columbia, 680 F. Supp. 40 (D.D.C. 1988).

44. *Id.* at 43.

45. Robertson v. Granite City Community Unit School Dist. No. 9, 684 F. Supp. 1002, 1005 (S.D. Ill. 1988). *See* Yearbook of Education Law 1988 at 110.

supplemented with resource room instruction, self-contained special classes, home instruction, and hospital or institutional instruction. Within this continuum of placements, a child must be educated in the least restrictive environment, which may be in a public or private school system depending on the needs of the child and the availability of an appropriate program.

Least Restrictive Environment

The EHA provides that "to the maximum extent appropriate, handicapped children . . . are to be educated with children who are not handicapped, and that . . . removal of handicapped children from the regular educational environment [should occur] only when the nature or severity of the handicap is such that education in regular classes with use of supplementary aids and services cannot be achieved satisfactorily."[46]

In rejecting reimbursement for a residential placement, the Eighth Circuit Court of Appeals stated that "children who can be mainstreamed should be mainstreamed, if not for the entire day, then for part of the day; similarly, children should be provided with an education close to their home, and residential placements should be resorted to only if these attempts fail or are plainly untenable."[47] The parents had unilaterally placed their mentally handicapped child in a residential facility without giving the school district an opportunity to explore less restrictive placements. A Georgia federal district court also found a proposed public school program appropriate rather than a residential placement because it represented the least restrictive environment for meeting a child's educational needs.[48]

The least restrictive appropriate environment for an incontinent, trainably mentally handicapped (TMH) child with AIDS was addressed in a Florida case.[49] The parents claimed that a TMH classroom was the appropriate placement while the school district argued that the child must be educated in a homebound instruction program. The federal district court, concluding that the Rehabilitation Act of 1973 did not add to the rights available under the EHA, assessed the claim solely on the basis of the EHA entitlement to a free appropriate public education. In balancing the rights of the handicapped child against the risks posed for other students, the court recommended a restricted public school placement. Specifically, the court ordered the construction of a separate

46. 20 U.S.C. § 1415 (e).

47. Evans v. District No. 17 of Douglas County, Neb., 841 F.2d 824, 832 (8th Cir. 1988).

48. Hall v. Freeman, 700 F. Supp. 1106 (N.D. Ga. 1987).

49. Martinez v. School Bd. of Hillsborough County, Fla., 692 F. Supp. 1296 (M.D. Fla. 1988).

room (noting size and design features) within the TMH classroom and the provision of a full time aide.

On appeal, the Eleventh Circuit Court of Appeals vacated the district court's decision and remanded the case for further proceedings.[50] The court of appeals emphasized that handicapped children possess distinct rights under both the EHA and the Rehabilitation Act, which form a "particularly intricate" relationship when invoked by a child with an infectious disease.[51] Together, the two statutes form a complementary set of standards that must be used to assess the appropriateness of a child's placement.[52] First, the appropriate placement under the EHA must be established. Second, a determination must be made as to whether the child is "otherwise qualified" to participate in the program, despite the contagious disease. Third, if the child is not otherwise qualified, the court must assess whether reasonable accommodations can reduce the risk to others. The court elaborated that "[i]n considering accommodations that would make the child 'otherwise qualified,' the court must bear in mind the requirement that to the maximum extent appropriate, the child is to be educated in the least restrictive environment."[53] Furthermore, the appellate court noted that the "remote theoretical possibility" of transmission found by the trial court did not pose a risk level significant enough to justify exclusion from the classroom.[54]

Three cases addressed the issue of mainstreaming for hearing impaired students. The issue arose in the context of determining the appropriate methodology for educating these handicapped children. Different philosophical positions exist regarding whether hearing impaired children should be educated in segregated or nonsegregated schools and whether oral-aural instruction, manual instruction, total communication, or cued speech should be employed. In a Pennsylvania case, a hearing impaired mother argued that the appropriate placement for her two hearing impaired children was their current private school placement utilizing oral-aural instruction.[55] This method seeks to maximize the development of students' residual hearing with minimal reliance on lip reading. The school district recommended placement in its hearing impaired education program employing the total communication approach—combining lip reading, a hearing aid, and sign language. In this case, the court did not attempt to identify the best method for educating hearing impaired children but rather to assess whether the proposed school district place-

50. Martinez v. School Bd. of Hillsborough County, Fla., 861 F.2d 1502 (11th Cir. 1988).
51. *Id.* at 1505.
52. *Id.*
53. *Id.* at 1506.
54. *Id.*
55. Visco v. School Dist. of Pittsburgh, 684 F. Supp. 1310 (W.D. Pa. 1988).

ment was appropriate. While acknowledging congressional preference for mainstreaming, the federal district court, citing extensively from the 1988 report of the Commission on Education of the Deaf presented to the President and Congress, recognized that a segregated school for deaf children in some instances may be the least restrictive environment. In assessing the appropriateness of the students' placement, the court relied on EHA regulations stating that "[i]n selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services he or she needs."[56] After weighing the potential harmful effects of altering the students' placement, the court found no basis for interrupting their successful educational programs by introducing a different method of teaching merely for the sake of mainstreaming for a few years.

In an Illinois case, the parents sought to enjoin the school district from assigning their hearing impaired son to a self-contained classroom and requiring him to learn sign language. The parents advocated placement in the neighborhood school in a regular classroom with the assistance of a cued speech instructor. Although the federal district court characterized the disagreement as one involving teaching methodology and dismissed the complaint, the parents asserted that the school district's proposed program did not satisfy the EHA's least restrictive environment provision. The Seventh Circuit Court of Appeals affirmed the decision, finding the mainstreaming and methodology issues inseparable; mainstreaming simply cannot be evaluated in the abstract.[57] The school district was held to be responsible for selecting the teaching method most appropriate to a child's needs; the teaching approach then determines the delivery system. Under the EHA, parents do not have the right to demand a specific methodology or program.

A Michigan federal district court held that a parent of a hearing impaired child failed to show that a proposed public school program in the least restrictive environment was not appropriate under the EHA.[58] The court found the basic disagreement in this case to revolve around mainstreaming versus a segregated school. While recognizing the significant emotional, cultural, and social advantages of a special school, the court concluded that the public school program would still enable the student to develop her maximum potential as required by state law.

Private Facilities

Public school districts are required to place handicapped students in private facilities only if an appropriate public placement is not available.

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56. *Id.* at 1315.
57. Lachman v. Illinois State Bd. of Educ., 852 F.2d 290 (7th Cir. 1988).
58. Barwacz v. Michigan Dep't of Educ., 681 F. Supp. 427 (W.D. Mich. 1988).

If parents place their children in such facilities when an appropriate public school program is available, they must pay the costs. However, under the Supreme Court's 1985 decision in *Burlington School Committee v. Department of Education*, parents who unilaterally place their children in a private facility pending resolution of a placement may be awarded tuition reimbursement if it is later determined that the private placement is appropriate and the public school placement is inappropriate.[59]

Again in 1988, courts reviewed a number of cases involving parental requests for tuition reimbursement for unilateral private placements of their handicapped children. The Eleventh Circuit Court of Appeals affirmed a federal district court's decision that the proposed placement of a handicapped child with numerous physical and emotional problems in a state mental hospital was an inappropriate placement.[60] Testimony from experts, including the hospital staff, indicated that the hospital was not equipped to address the specific needs of the child and that she would not benefit educationally from the placement. Finding the out-of-state private placement arranged by the parent appropriate, the court ordered the school district to reimburse the parent's costs.

The Third Circuit Court of Appeals awarded a Pennsylvania parent reimbursement for his son's private placement in 1983-84.[61] The initial IEP proposed by the school district was found inadequate, while the parent's placement was deemed to be appropriate. The Fourth Circuit Court of Appeals ruled that the parents were entitled to reimbursement of private school costs because the school district did not provide their child a free appropriate public education.[62] By not conducting a required multi-disciplinary review of the child's program and by not involving the parents in the development of the IEP, the school district was found to have "utterly failed" to identify the child's special educational needs.

A federal district court repeated an earlier order requiring the District of Columbia school district to reimburse parents for a private placement.[63] The school district claimed that the parents were not entitled to reimbursement because the court failed specifically to find their proposed placement inappropriate. The court disagreed, citing explicit language from the opinion that addressed the inappropriateness of the public school program.

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59. 471 U.S. 359 (1985). See The Yearbook of School Law 1986 at 128-29.

60. Jefferson County Bd. of Educ. v. Breen, 694 F. Supp. 1539 (N.D. Ala. 1987), *aff'd*, 853 F.2d 853 (11th Cir. 1988).

61. Muth v. Central Bucks School Dist., 839 F.2d 113 (3d Cir. 1988).

62. Board of Educ. of Cabell County v. Dienelt, 843 F.2d 813 (4th Cir. 1988). The court also rejected retroactive imposition of a state adopted statute of limitations for appealing state due process hearings.

63. Holmes v. District of Columbia, 680 F. Supp. 40 (D.D.C. 1988).

In a Virginia case a hearing officer's conclusion that a public school placement was inappropriate was upheld by a state appellate court. Although a lower court had disagreed with the hearing officer, the appellate court found that the evidence showed the child had not benefited from almost five years in the public school instructional program and in a brief period of time had made significant progress in the private placement.[64]

A Georgia parent's demand for tuition reimbursement for a private residential placement for her emotionally disturbed son was denied. Based on the evidence presented, the federal district court found the program proposed by the school district to be the appropriate placement for the particular problems of the child.[65] Although there was an indication that the child's home environment contributed to his problems, the court found no intrinsic educational need that would require residential placement.

In 1987 a New York federal district court awarded reimbursement for tuition to a parent who had placed his child in an unapproved private school. The court justified the order of reimbursement and continued placement on the fact that the commissioner of education had not been able to locate an appropriate alternative placement.[66] The Second Circuit Court of Appeals reversed the decision, holding that the district court had no authority to order the placement.[67] Under the EHA, handicapped children can be educated in private facilities only if they meet state educational standards. The court order specifically violated a New York standard that requires all contracts between local school districts and private schools for the educaton of handicapped children to be approved by the commissioner of education. In a subsequent case, another New York federal district court followed the Second Circuit Court's decision, ruling that parents were not entitled to reimbursement for private school tuition paid to an unapproved facility.[68]

The District of Columbia Federal District Court concluded that the public school system's proposed placement was inappropriate because the system was unable to provide all services required to conform to the child's IEP.[69] The school system argued that it could provide the services but the evidence indicated that a significant number of students in need of the service in the schools were not being served.

In another case, the District of Columbia Court of Appeals remanded

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64. Beasley v. School Bd. of Campbell County, 367 S.E.2d 738 (Va. Ct. App. 1988).
65. Hall v. Freeman, 700 F. Supp. 1106 (N.D. Ga. 1987).
66. *See* Yearbook of Education Law 1988 at 117-18.
67. Antkowiak v. Ambach, 838 F.2d 635 (2d Cir. 1988).
68. Hiller v. Board of Educ. of Brunswick Cent. School Dist., 687 F. Supp. 735 (N.D.N.Y. 1988).
69. Kattan v. District of Columbia, 691 F. Supp. 1539 (D.D.C. 1988).

a 1987 case, which supported a private placement.[70] The appellate court found no explanation for a rejection of the hearing officer's determination that the public school placement was appropriate. It appeared to the appellate court that the lower court relied on a potential-maximizing standard or simply substituted its judgment for that of the hearing officer.

The eleventh amendment was raised as a bar to the recovery of tuition costs in several cases. Under the eleventh amendment, states cannot be sued in federal courts unless they consent through waiver of immunity or Congress expressly abrogates immunity. The Supreme Court's determination that Congress did not abolish states' immunity to suit in the Rehabilitation Act of 1973 has raised questions regarding states' immunity to suits under the EHA.[71] The Ninth Circuit Court of Appeals, relying on its earlier opinion in *Doe v. Maher*,[72] held that Congress had not expressed an unmistakable intent to abrogate states' immunity pursuant to its fourteenth amendment enforcement powers, nor had it conditioned the receipt of funds on the states' waiver of immunity.[73] The Third Circuit Court of Appeals, however, concluded that the EHA and its legislative history "leave no doubt" that Congress intended to abrogate states' immunity.[74] The court specifically noted congressional language in the preamble to the law: "it is in the national interest that the [f]ederal government assist [s]tate and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law."[75] While the Third Circuit Appellate Court joins the First Circuit Court of Appeals in holding that the EHA authorizes suits against states for costs, the Seventh, Eighth, and Ninth Circuit Appellate Courts disagree.[76] The Supreme Court granted certiorari to address the issue.

Related Services

The EHA specifies that an appropriate education includes special education *and* related services "required to assist a handicapped child to

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70. Kerkam v. McKenzie, 862 F.2d 884 (D.C. Cir. 1988). *See* Yearbook of Education Law 1988 at 119.

71. *See* Yearbook of School Law 1986 at 139-41.

72. 793 F.2d 1470 (9th Cir. 1986), *aff'd sub nom.* Honig v. Doe, 108 S. Ct. 592 (1988). While the Supreme Court affirmed the Ninth Circuit Court's decision, the question of whether a state can be required to provide services when a local school district does not provide them was affirmed by an equally divided vote without discussion.

73. Kerr Center Parents Ass'n v. Charles, 842 F.2d 1052 (9th Cir. 1988). *See also* Hiller v. Board of Educ. of Brunswick Cent. School Dist., 687 F. Supp. 735 (N.D.N.Y. 1988) (eleventh amendment bars monetary relief).

74. Muth v. Central Bucks School Dist., 839 F.2d 113 (3d Cir. 1988), *cert. granted*, 109 S. Ct. 52 (1988).

75. *Id.* at 128.

76. *Id.* at 129.

benefit from special education."[77] The Third Circuit Court of Appeals emphasized the important role of related services in the educational program of some handicapped children.[78] The court noted that students with severe physical disabilities may require related services, such as physical therapy, as a prerequisite to classroom instruction or may require a program largely consisting of such therapy. In this case, the court found that physical therapy was not "merely a conduit" to the child's education, but "constituted, in and of itself, a major portion of his special education."[79] Based on extensive evidence indicating that the child needed direct physical therapy by a licensed, trained professional, the court reversed the decision of the district court granting summary judgment to the school district and remanded the case for further proceedings.

Similarly, a New York federal district court noted that physical development was only one component in a student's program but was a "critically important" one.[80] Accordingly, the court issued a preliminary injunction requiring the school district to continue the child's physical therapy on a twelve-month basis. Expert testimony indicated that the orthopedically impaired student would experience significant regression in his upper body strength and his ambulation skills in the absence of a summer program. Although the physical therapy was not part of an educational program for the summer months, it was found to constitute "special education" under New York law ("specially designed individualized or group instruction *or* special services or programs . . . to meet the individual needs of pupils with handicapping conditions").[81]

In a unique situation, an insurance company demanded that a school district provide a trained attendant during the school day for a student with a tracheostomy.[82] Following injuries from an automobile accident, the insurance company had paid all medical expenses of the child, including the cost of the attendant. The federal district court dismissed the case, finding that the administrative procedures for determining special education needs and related services were only available to the parents and school district; the insurer had no standing to seek benefits or protection from the EHA.

DISCIPLINE

Most courts have agreed that the expulsion of handicapped students

77. 20 U.S.C. § 1401 (17).
78. Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3d Cir. 1988).
79. *Id.* at 176.
80. Holmes v. Sobol, 690 F. Supp. 154 (W.D.N.Y. 1988).
81. *Id.* at 159.
82. Allstate Ins. Co. v. Bethlehem Area School Dist., 678 F. Supp. 1132 (E.D. Pa. 1987).

for disciplinary reasons is a change in placement triggering the procedural safeguards of the EHA. In *Honig v. Doe*, the Supreme Court rendered its first decision addressing such exclusion.[83] The case involved two California students who were suspended indefinitely for dangerous behavior pending the outcome of expulsion proceedings. A California federal district court and the Ninth Circuit Court of Appeals entered summary judgment for the students, finding that the indefinite suspension was a prohibited change in placement and violated the stay-put provision of the EHA.[84]

On appeal, the state superintendent of public instruction urged the Supreme Court to recognize a "dangerousness" exception to the stay-put requirement.[85] The superintendent contended that Congress could not have intended that school officials return violent or dangerous students to the classroom during the lengthy EHA proceedings. Disagreeing, the Supreme Court stated that Congress deliberately stripped schools of the unilateral authority to exclude handicapped students. The history of exclusion of handicapped students prior to the enactment of the EHA and the early litigation that guided the development of the law convinced the Court that the conspicuous absence of an emergency exception was intentional.

The Court, however, emphasized that school officials are not without options when confronted with a dangerous student. They can use a range of normal procedures, including detention, use of study carrels, timeouts, and restriction of privileges. A student who is an immediate threat can be suspended for ten days, which, according to the Court, does not constitute a change in placement. If the child continues to pose a threat and the parents refuse to agree to a change in placement, school officials can seek injunctive relief from the courts, but bear the burden of showing that a child is truly dangerous to himself or to others.

REMEDIES

Compensatory Services

The Eleventh Circuit Court of Appeals compared the award of compensatory educational services to retroactive reimbursement of tuition costs; both are needed to ensure a child's right to a free appropriate education. The federal district and appellate courts agreed that an

83. 108 S. Ct. 592 (1988).

84. *See* Yearbook of School Law 1987 at 131.

85. The case was moot for one of the students, who was 24 years old and no longer eligible for services at the time of review. Although the other student, who was 20, was not in school, he was still eligible for educational services and if he enrolled in a program could be subjected to unilateral exclusion again.

Alabama child was entitled to receive two years of compensatory education beyond the age of twenty-one because the school district failed to provide an appropriate placement.[86] The appellate court noted that such awards should serve as a deterrent against school systems prolonging proceedings to reduce their potential liability. The Second Circuit Appellate Court awarded one and one-half years of compensatory education to a student deprived of an education during the pendency of a protracted hearing after the closure of his former school. The court commented that "[a]dministrative and legal proceedings are often lengthy, and a person who prevails at the end of such proceedings should be able to obtain what the proceedings establish he was entitled to when they began."[87] The Supreme Court of Wyoming, however, held that under state constitutional and statutory limitations a hearing officer had no authority to order compensatory services and the local district had no authority to the provide the services.[88]

Attorneys' Fees

Congress enacted the Handicapped Children's Protection Act (HCPA) in 1986 to grant courts the discretion to award reasonable attorneys' fees to parents who prevail against school systems. Fees are recoverable for any action or proceeding filed after July 3, 1984, or pending at that time.

Again in 1988, the most frequent controversy raised under the HCPA was the issue of attorneys' fees for administrative proceedings. The Sixth Circuit Court of Appeals rendered the first appellate level decision addressing whether an administrative hearing is an "action or proceeding" for which attorneys' fees can be awarded.[89] Similar to most 1988 federal district court rulings regarding recovery of fees for such proceedings,[90] the Sixth Circuit Appellate Court concluded that the legislative history showed a clear intent that attorneys' fees are available. Although

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86. Jefferson County Bd. of Educ. v. Breen, 694 F. Supp. 1539 (N.D. Ala. 1987), *aff'd*, 853 F.2d 853 (11th Cir. 1988).

87. Burr v. Ambach, 863 F.2d 1071, 1078 (2d Cir. 1988).

88. Natrona County School Dist. No. 1 v. McKnight, 764 P.2d 1039 (Wyo. 1988). *See* Monahan v. School Dist. No. 1 of Douglas County, 425 N.W.2d 624 (Neb. 1988); Natrona County School Dist. v. Ryan, 764 P.2d 1019 (Wyo. 1988) (education can be provided only until age 21); *see* text with note 5.

89. Eggers v. Bullitt County School Dist., 854 F.2d 892 (6th Cir. 1988).

90. Burr v. Ambach, 683 F. Supp. 46 (S.D.N.Y. 1988); Chang v. Board of Educ. of Glen Ridge Township, 685 F. Supp. 96 (D.N.J. 1988); Medford v. District of Columbia, 691 F. Supp. 1473 (D.D.C. 1988); Michael M. v. Board of Educ. of New York City School Dist., 686 F. Supp. 995 (E.D.N.Y. 1988); Neisz v. Portland Pub. School Dist., 684 F. Supp. 1530 (D. Or. 1988); Robert D. v. Sobel, 688 F. Supp. 861 (S.D.N.Y. 1988); Turton v. Crisp County School Dist., 688 F. Supp. 1535 (M.D. Ga. 1988); Sidney v. Ambach, 535 N.Y.S.2d 468 (App. Div. 1988).

Congress modeled the fee awards after other fee shifting statutes, the appellate court found the United States Supreme Court's decision in *North Carolina Department of Transportation v. Crest Street Community Council*, holding that fees are available under 42 U.S.C. section 1988 only if they are part of a lawsuit, distinguishable.[91] Unlike section 1988, the court noted that the EHA mandates exhaustion of a grievance at the local or state level. Furthermore, various provisions in the HCPA refer directly to the availability of fees for work conducted at the administrative level.

In a Virginia case, a federal district court confronted a request for attorneys' fees for services performed in a dispute resolved prior to the due process hearing.[92] Relying upon section 1415(e)(4)(D), which restricts fee awards if an offer of settlement is rejected by the parent before the administrative proceeding begins, the court stated that the "inescapable implication" is that fees can be recovered for services prior to an offer and thus before the commencement of official proceedings.

The District of Columbia Federal District Court awarded fees to parents' counsel for participation in the development of the individualized education program.[93] Although the school district argued that fees for assistance are prohibited, the district court, finding neither a requirement or prohibition in the law, concluded that fees were appropriate because counsel's presence contributed to the eventual success of the parents.

School districts continued to challenge the retroactive application of the attorneys' fees provision as violating the separation of powers and Congress's spending power under article I, section 8 of the Constitution. An Illinois federal district court held that the attorneys' fees provision does not violate the separation of powers because the substantive decision of the court is not affected.[94] Citing a recent Supreme Court decision, the district court noted that "a motion for attorneys' fees does not imply a change in the judgment but rather what is due as a result of the judgment."[95]

Several school districts, relying on the Supreme Court's decision in *Pennhurst State School and Hospital v. Halderman*, argued that the HCPA exceeded Congress's spending power since it retroactively im-

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91. 107 S. Ct. 336 (1986). *See* Yearbook of Education Law 1988 at 122-23; Counsel v. Dow, 849 F.2d 731 (2d Cir. 1988) (fees were available for an administrative hearing followed by a lawsuit).

92. Rossi v. Gosling, 696 F. Supp. 1079 (E.D. Va. 1988) (remanded for an evidentiary hearing to determine if parents were the prevailing party).

93. Medford v. District of Columbia, 691 F. Supp. 1473 (D.D.C. 1988).

94. Max M. v. Illinois State Bd. of Educ., 684 F. Supp. 514 (N.D. Ill. 1988), *aff'd*, 859 F.2d 1297 (7th Cir. 1988) (appellate court addressed "vested rights" only); *see* text with note 106.

95. *Id.* at 521.

posed conditions upon the receipt of federal funds.[96] The Supreme Court, however, did not hold that Congress could not retroactively condition the receipt of federal funds; rather, the Court held that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."[97] In examining the legislative history of the HCPA, the Second Circuit Court of Appeals held that the law was enacted not only under Congress's spending power but under the fourteenth amendment.[98] Accordingly, the court concluded that Congress did not abuse its authority because it acted pursuant to its fourteenth amendment enforcement powers and clearly expressed its intent to make the fees retroactive. The Fifth Circuit Court of Appeals and several federal district courts ruled similarly regarding this issue.[99]

School systems also raised the eleventh amendment as a bar against the award of attorneys' fees. In earlier decisions, most courts concluded that the EHA was enacted under the fourteenth amendment, and that Congress has the power to set aside sovereign immunity to enforce the fourteenth amendment. Two federal district courts adopted this position, concluding that fees were permissible.[100] Citing the Supreme Court's decision in *Hutto v. Finney*,[101] the Seventh Circuit Court of Appeals held that an award of attorneys' fees as part of costs does not violate a state's eleventh amendment immunity.[102] Fees were found to be permissible, prospective relief, not damages which are prohibited. The Fifth Circuit Appellate Court also followed *Hutto* and designated fees as costs.[103]

The HCPA provides that prevailing parents are eligible for fees if the action or proceeding was filed prior to July 4, 1984 or was pending on that date. Several school districts argued that to award fees in settled cases violated their "vested rights." Under the vested rights doctrine, a judgment is a type of property and legislatures have no greater power over that property than any other. The Seventh Circuit Court of Appeals

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96. 450 U.S. 1 (1981).

97. *Id.* at 17.

98. Counsel v. Dow, 849 F.2d 731 (2d Cir. 1988).

99. Fontenot v. Louisiana Bd. of Elementary and Secondary Educ., 835 F.2d 117 (5th Cir. 1988); Max M. v. Illinois State Bd. of Educ., 684 F. Supp. 514 (N.D. Ill. 1988); Turton v. Crisp County School Dist., 688 F. Supp. 1535 (M.D. Ga. 1988).

100. Max M. v. Illinois State Bd. of Educ., 684 F. Supp. 514 (N.D. Ill. 1988); Michael M. v. Board of Educ. of New York City School Dist., 686 F. Supp. 995 (E.D.N.Y. 1988).

101. 437 U.S. 678 (1978).

102. Tonya K. v. Board of Educ. of Chicago, 847 F.2d 1243 (7th Cir. 1988).

103. Fontenot v. Louisiana Bd. of Elementary and Secondary Educ., 835 F.2d 117 (5th Cir. 1988). *See* Georgia Ass'n of Retarded Citizens v. McDaniel, 855 F.2d 794 (11th Cir. 1988). The Eleventh Circuit Appellate Court noted that federal courts can assess costs of litigation against states and, as such, held that interest on those costs is not barred by the eleventh amendment.

held that vested rights were not affected in an Illinois case.[104] In this instance, the parties in 1984 deferred the issue of attorneys' fees until the Supreme Court rendered its decision in *Smith v. Robinson*.[105] After the Supreme Court's decision holding that fees were not available, the parents withdrew their claim, which the court equated to dismissal without prejudice. Since there had been no judicial disposition of the fee request, the school system was found to have no vested rights. Similarly, in a second case, the Seventh Circuit Appellate Court stated that "[t]o pass by a request in silence is not to put it beyond recall by subsequent legislation."[106] Again, the court held that vested rights are not involved when the court has not addressed and resolved the fee claim.[107] Where parents pressed their claim for attorneys' fees after *Smith* and a final judgment was rendered regarding fees, the Eleventh Circuit Court of Appeals denied relief.[108]

While courts are granted the discretion to award fees, only special circumstances justify denial. According to the Ninth Circuit Court of Appeals, special circumstances does not include "upsetting settled expectations" established prior to the enactment of HCPA; to accept such a position would effectively eliminate the Act's retroactive provision.[109] The court stated that two factors must be examined to determine if special circumstances exist for denial: "(1) whether awarding fees would further the congressional purpose in enacting the Education of the Handicapped Act, and (2) the balance of the equities."[110] A Virginia school district argued that a settlement at the pre-hearing stage constituted special circumstances justifying denial of fees.[111] While the federal district court rejected this position, it did order an evidentiary hearing to assess, inter alia, whether an award of fees was warranted based on the parties initial positions and subsequent changes in those positions.

The timeliness of the filings for attorneys' fees was contested in several cases. Since the EHA and the HCPA do not contain a statute of limitations, courts borrow an analogous state law provision. Two New York federal district courts rejected a state four month statute of limita-

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104. Tonya K. v. Board of Educ. of Chicago, 847 F.2d 1243 (7th Cir. 1988).

105. 468 U.S. 992 (1984).

106. Max M. v. New Trier High School Dist. No. 203, 859 F.2d 1297, 1299 (7th Cir. 1988).

107. *See also* Doe v. Watertown School Comm., 701 F. Supp. 264 (D. Mass. 1988). The lack of prior adjudication of a fee claim resulted in an award for an administrative hearing even though school officials did not have an opportunity to appeal the administrative decision because the parent moved to another community. The court found no evidence that the school system would have prevailed on appeal.

108. Georgia Ass'n of Retarded Citizens v. McDaniel, 855 F.2d 805 (11th Cir. 1988).

109. Abu-Sahyun v. Palo Alto Unified School Dist., 843 F.2d 1250, 1252 (9th Cir. 1988).

110. *Id.* at 1253 (case remanded for reconsideration under the appropriate factors).

111. Rossi v. Gosling, 696 F. Supp. 1079 (E.D. Va. 1988).

tions governing EHA claims as appropriate for HCPA.[112] In finding a three year statute applicable, the courts noted that actions for attorneys' fees do not involve the same urgency as concerns related to a child's placement or program. Furthermore, the longer time period was found to promote congressional intent to encourage fee claims for actions commenced prior to the enactment of the HCPA. An Illinois federal district court waived its own local rule requiring requests for fees to be filed by prevailing parties within ninety days after the final judgment.[113] Although the judgment in the case was rendered four months prior to the adoption of the HCPA, the defendants argued that the rule should be applicable at the point the amendments became effective. The district court disagreed, finding a Federal Rule of Civil Procedure, which requires claims to be filed within a reasonable time, to be appropriate. Because of the complexity of the case (five published opinions) and the parents' attempt to negotiate a fee settlement, twelve and one-half months was held to be reasonable for filing the fee petition. The decision was affirmed by the Seventh Circuit Appellate Court.[114]

Parents who do not prevail on all issues may not be entitled to full reimbursement for attorneys' fees. The standard for determining partial awards was established by the Supreme Court in *Hensley v. Eckerhart*, which provides that "where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained."[115] Accordingly, the Third Circuit Court of Appeals remanded a case with instructions that the fees should be based on the parents' procedural claim, which was the only successful claim, not the substantive issue related to the appropriateness of the child's program.[116] Similarly, in a Seventh Circuit Appellate Court decision, parents who achieved only "a fraction of the relief" sought were awarded 50% of the fee claimed.[117] "Extremely limited success" against a local school district did not justify an award of attorneys' fees in a Second Circuit case.[118] Under the *Hensley* reduction standard, considerable discretion resides with the district court in reducing the amount of an award. A Georgia federal district court accepted counsels' voluntary

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112. Michael M. v. Board of Educ. of New York City School Dist., 686 F. Supp. 995 (E.D.N.Y. 1988); Robert D. v. Sobel, 688 F. Supp. 861 (S.D.N.Y. 1988).

113. Max M. v. Illinois State Bd. of Educ., 684 F. Supp. 514 (N.D. Ill. 1988).

114. Max M. v. Illinois State Bd. of Educ., 859 F.2d 1297 (7th Cir. 1988).

115. Muth v. Central Bucks School Dist., 839 F.2d 113, 130 (3d Cir. 1988), *quoting* 461 U.S. 424 (1983).

116. *Id. See also* Abney v. District of Columbia, 849 F.2d 1491 (D.C. Cir. 1988) (partial reimbursement to be determined on remand).

117. Max M. v. Illinois State Bd. of Educ., 684 F. Supp. 514 (N.D. Ill. 1988), *aff'd*, 859 F.2d 1297 (7th Cir. 1988).

118. Counsel v. Dow, 849 F.2d 731 (2d Cir. 1988) (state defendants were required to pay fees).

agreement to a 13% reduction.[119] In contrast to the preceding decisions, the Oregon Federal District Court held that time expended in seeking unsuccessful injunctive relief was compensable because it was instrumental in achieving the parents' ultimate goal.[120]

The reasonableness of attorneys' fees was questioned in two District of Columbia cases.[121] The federal district court noted that reasonableness revolves around three issues: market rate, reasonable number of hours, and adequacy of documentation.[122] In spite of school officials' extensive challenges regarding the rate charged, adequacy of documentation, counsels' expenditure of time, general productivity of counsel, charges for all telephone calls, length of calls, and, according to the court, a host of other "nitpicking claims," all claims by plaintiffs' counsels were found to be reasonable. Again in 1988, the federal district court was troubled by District of Columbia school officials' routine "do not settle, do not pay" stance.[123]

The hourly rate for attorneys' fees is governed by the prevailing fee rates in the community. An Oregon school district objected to a fee request at the upper end of the local rate scale, but the federal district court, noting the absence of documentation that the rate was excessive, granted the request.[124]

According to the HCPA, a court may award reasonable attorneys' fees as *part of the costs* to the parents.[125] The District of Columbia Federal District Court requested further briefing in a case from the parties as to whether expert witness fees are "costs" under the statute.[126] A Georgia federal district court, however, held that expert witness fees were compensable even though the witness did not appear at the hearing but merely provided assistance in the preparation of the case.[127] Based on a prior agreement at oral argument, expert witness fees were awarded

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119. Turton v. Crisp County School Dist., 688 F. Supp. 1535 (M.D. Ga. 1988).

120. Neisz v. Portland Pub. School Dist., 684 F. Supp. 1530 (D. Or. 1988).

121. Holmes v. District of Columbia, 680 F. Supp. 40 (D.D.C. 1988); Medford v. District of Columbia, 691 F. Supp. 1473 (D.D.C. 1988). The two cases represented the consolidation of 31 cases in which attorneys' fees were requested against the District of Columbia School District. Although the school district argued that each case must be decided on an individual basis, the court held them to be related cases. Furthermore, the court found school officials' efforts to thwart and frustrate plaintiffs' counsels through endless delays, extensions, and pleadings to justify consolidation to conserve judicial resources.

122. *See also* Behavior Research Institute v. Ambach, 535 N.Y.S.2d 465 (App. Div. 1988) (insufficient documentation presented; timesheets required for review).

123. Medford v. District of Columbia, 691 F. Supp. 1473, 1483 (D.D.C. 1988). *See* The Yearbook of Education Law 1988 at 127.

124. Neisz v. Portland Pub. School Dist., 684 F. Supp. 1530 (D. Or. 1988).

125. 20 U.S.C. § 1415(e)(4)(B).

126. Kattan v. District of Columbia, 691 F. Supp. 1539 (D.D.C. 1988).

127. Turton v. Crisp County School Dist., 688 F. Supp. 1535 (M.D. Ga. 1988).

as part of costs along with attorneys' fees in a New Jersey case.[128] Expert witness fees also were included as part of costs in a Massachusetts case.[129]

While the HCPA allows attorneys' fees for *parents or guardians* of handicapped children, this does not preclude eighteen year old handicapped youths from seeking fees in their own name. The Fifth Circuit Court of Appeals found nothing in the legislative history to indicate that Congress intended to foreclose actions by students who have reached the age of majority.[130]

Two appellate courts addressed who is eligible to receive compensation for legal representation of parents. The Sixth Circuit Court of Appeals reversed a lower court's denial of an award of attorneys' fees to prevailing parents represented by publicly funded attorneys.[131] The court found that the legislative history of the HCPA showed a clear intent to provide fees regardless of whether attorneys were private or public organizations. The original language in the Senate's proposed bill placed a limitation on attorneys funded from federal, state, or local funds. A compromise was reached in the Conference Committee providing that all attorneys would be compensated at the prevailing rates in the community with no bonuses and multipliers permitted.

New Jersey law permits lay advocates to assist parents in administrative hearings but prohibits fees for legal representation. A lay advocate challenged the "no fee" rule as interfering with parents' rights to secure expert assistance and representation. The Third Circuit Court of Appeals held that the EHA did not preempt the state's authority to regulate the legal profession.[132] While the state law prevented a lay advocate from charging for legal representation, this did not limit parents' access to expert assistance. Experts could still participate in administrative hearings and collect fees for testimony, preparation of reports, consultation with parents, attendance at hearings, and other such services.

Federal Funding

The federal government appropriates funds annually to the states for special education programs and services under EHA-B.[133] Of the total funds received, states must distribute 75% to local school districts. Funds allocated to school districts that are not expended revert to the

128. Chang v. Board of Educ. of Glen Ridge Township, 685 F. Supp. 96 (D. N.J. 1988).
129. Doe v. Watertown School Comm., 701 F. Supp. 264 (D. Mass. 1988).
130. Fontenot v. Louisiana Bd. of Elementary and Secondary Educ., 835 F.2d 117 (5th Cir. 1988).
131. Eggers v. Bullitt County School Dist., 854 F.2d 892 (6th Cir. 1988).
132. Arons v. New Jersey State Bd. of Educ., 842 F.2d 58 (3d Cir. 1988).
133. 20 U.S.C. § 1400(c).

state, and, likewise, unexpended state funds are returned to the federal government. Under the Tydings Amendment, school districts and states must obligate and expend all allocated funds prior to the end of each fiscal year succeeding the fiscal year of appropriation.[134] The Department of Education challenged Massachusetts' disposition of unexpended funds as not conforming to the Tydings Amendment. Massachusetts did not officially reallocate funds captured from local school districts until after the Tydings deadline. The state, however, argued that funds were redistributed to school districts for expenditures that had occurred during the Tydings period. In deferring to the Department of Education's interpretation of the amendment, the First Circuit Court of Appeals held that the funds must be *obligated and expended* during the time frame specified in the statute.[135] States do not have the discretion to obligate funds after the deadline for earlier expenditures; to permit the reallocation after the Tydings date would enable states effectively to avoid any return of funds to the federal government.

An Illinois appellate court held that the EHA prevented the state from seeking reimbursement from the estate of a deceased minor for the provision of educational services.[136] To qualify for funds under the EHA, states must assure all handicapped children a free appropriate public education. The state agreed that it could not obtain reimbursement from the minor or the minor's relatives, but argued that recovery could be sought from the settlement of a medical malpractice suit that caused the handicapping condition. While the court acknowledged that reimbursement from the malpractice settlement that caused the injury would appear to be fair, federal regulations do not authorize recovery. The court distinguished this determination from the valid contractual obligation that an insurance company might have to provide services. A tortfeasor is obligated only to reimburse expenses to the injured individual.

State Law

Under Pennsylvania law, a state court upheld the secretary of education's determination that the Philadelphia School District must provide a hearing-impaired student transportation to a private clinic for unisensory auditory therapy twice a month.[137] Although the school district was

134. 20 U.S.C. § 1225(b)(1).

135. Commonwealth of Mass., Dep't of Educ. v. United States Dep't of Educ., 837 F.2d 536 (1st Cir. 1988).

136. *In re* Guardianship Estate of Zarse, 529 N.E.2d 50 (Ill. App. Ct. 1988).

137. School Dist. of Philadelphia v. Commonwealth Dep't of Educ., 547 A.2d 520 (Pa. Commw. Ct. 1988).

providing multisensory therapy bi-weekly, the secretary found that the specialized unisensory therapy, focusing solely on the development of residual hearing, would be of assistance in the child's current program and in the future. The school district protested that it was not required to provide the best possible program but only one that enables a child to receive some educational benefit. Under Pennsylvania law, the court noted that an appropriate program is determined by "*how well the program satisfies the recognized needs* of the individual child," and the evidence indicated that the additional services were based on the needs of the child.[138]

A New York court interpreted the phrase "actual and only residence" in the state education law.[139] In this case, a child who had lived in a "family home at board" from birth was denied free public schooling when his parents moved to another state. Because the parents retained financial responsibility for the child and continued to participate in his educational program, the commissioner of education concluded that the residence of the child should be that of his parents. The court, however, found that the law, which provided that "children cared for in family homes at board . . . shall be deemed residents of the school district in which such family home is located," was not altered by the parents' acknowledgement of their financial obligation; the family home at board was the actual and only residence.[140]

A California appellate court upheld a trial court's issuance of a permanent injunction ordering a school district to permit the attendance of a student with AIDS and an award of attorneys' fees.[141] The school district argued that the permanent injunction was unnecessary because the child had been admitted under a preliminary injunction, and, furthermore, attorneys' fees were not warranted under state law. Rejecting the school district's claims, the court found that the child was in school "solely" because of the preliminary injunction, and there was no guarantee that the school district would not change its position. Attorneys' fees were found to be justified on the basis that the case involved the enforcement of an important right and resulted in the school district establishing a policy on AIDS and infectious diseases.

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138. *Id.* at 522, *quoting* Centennial School Dist. v. Department of Educ., 503 A.2d 1090, 1094 (1986).

139. Catlin v. Sobol, 532 N.Y.S.2d 1006 (Sup. Ct. 1988). The Second Circuit Appellate Court had earlier abstained from ruling in the case because the state courts had not interpreted the residency law. *See* Yearbook of Education Law 1988 at 129.

140. *Id.* at 1008.

141. Phipps v. Saddleback Valley Unified School Dist., 251 Cal. Rptr. 720 (Ct. App. 1988).

Discrimination Under the Rehabilitation Act, Section 504

The Rehabilitation Act of 1973, section 504, provides that "[n]o otherwise qualified handicapped individual . . . shall, solely by reasons of his handicap, be excluded from participation in, or be denied the benefits of, or be subjected to discrimination under any program or activity receiving [f]ederal financial assistance."[142] Section 504 is broader than the EHA and applies to educational and noneducational agencies receiving federal assistance. It prohibits recipients of federal funds from discriminating against handicapped individuals in educational programs and employment.

Students

Two courts issued preliminary injunctions allowing students with AIDS to attend school. An Illinois federal district court, in weighing the factors to determine if an injunction should be issued, held that it was likely at trial that the student would be found handicapped under section 504 because of the perception that a person with AIDS is impaired as well as the person having an actual physiological impairment of the hemic, lymphatic, and reproductive systems.[143] With the overwhelming consensus of the medical profession that there is no significant risk of transmission in the classroom, the court also concluded that the student would probably be found "otherwise qualified" to attend school. Additionally, failure to return the student to the classroom would result in irreparable injury in terms of his self-esteem and need to interact socially with other children, and no adequate remedy existed at law to compensate the child for this injury. Finally, the court concluded that the speculative risk to others did not outweigh the injury to the student. Another Illinois federal district court drew similar conclusions in issuing a preliminary injunction.[144]

Section 504 claims were raised in two higher education cases. The Sixth Circuit Court of Appeals affirmed a federal district court's decision that a student with retinitis pigmentosa (disease that causes loss of peripheral vision and loss of sight in reduced light) was not "otherwise qualified" for an optometry program because he could not fulfill the clinical proficiency requirements due to his handicap.[145] The appellate

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142. 29 U.S.C. § 794.

143. Doe v. Dolton Elementary School Dist. No. 148, 694 F. Supp. 440 (N.D. Ill. 1988).

144. Robertson v. Granite City Community Unit School District No. 9, 684 F. Supp. 1002 (S.D. Ill. 1988). *See also* text with note 49, *supra* (both EHA and section 504 were used to assess the appropriate placement of a child with AIDS).

145. Doherty v. Southern College of Optometry, 862 F.2d 570 (6th Cir. 1988).

court concluded that the waiver of the requirement would not have been a reasonable accommodation; an institution is not required to eliminate course requirements which are necessary for a particular degree.

A student sought readmission to a law school, arguing that the university had discriminated against him on the basis of his handicap—alcoholism.[146] He claimed that he would have achieved the minimum grade required for retention "but for his drinking." Relying on the Supreme Court's holding in *Southeastern Community College v. Davis*,[147] the court noted that "the right inquiry is whether the person can satisfy the program's requirements despite his handicap."[148] The court stated that the Rehabilitation Act prohibits decisions based on stereotypes about a handicap but not reasoned judgments about performance related to the handicap.

Employees

The cases discussed in this section interpreting the Rehabilitation Act of 1973 involve employees in general rather than merely school personnel.

Handicapped Persons. To invoke the protections of the Rehabilitation Act employees must first establish that they are "handicapped" within the meaning of the Act. As defined by Congress, a handicapped individual is any person who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.[149] In reviewing claims, courts first determine if there is an impairment, and then assess whether it substantially limits a major life activity.

Individuals suffering from alcoholism and drug addiction often assert claims that they are handicapped within the meaning of section 504. A 1978 amendment to the Act specifically states that the term handicapped "does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others."[150] In a New York City case, transportation workers argued that they were handicapped individuals because the city viewed them as drug abusers after positive drug-test results.[151] As handicapped individuals, they contended that their employ-

146. Anderson v. University of Wis., 841 F.2d 737 (7th Cir. 1988).
147. 422 U.S. 397 (1979).
148. Anderson v. University of Wis., 841 F.2d 737, 740 (7th Cir. 1988).
149. 29 U.S.C. § 706(7)(B).
150. 92 Stat. 2955, 2984-85 (1978).
151. Burka v. New York City Transit Auth., 680 F. Supp. 590 (S.D.N.Y. 1988).

ment could not be terminated unless it could be shown that drug use impaired their ability to perform their jobs. A federal district court rejected their claim, commenting that "[t]he notion that Congress would consider illegal drug abusers, as a general group, to be 'handicapped individuals' within the meaning of section 504 is antithetical to the goals of sound law enforcement and trivializes the commonly understood meaning of the word 'handicapped.'"[152] The court held that the intent behind the amendment was to protect otherwise qualified drug abusers who have been or are being rehabilitated.[153]

The Ninth Circuit Court of Appeals, relying on the Supreme Court's determination that individuals suffering from contagious diseases are handicapped, held (without discussion) that a person with AIDS is handicapped.[154]

Discrimination Claims. In a Supreme Court case, two recovering alcoholics claimed they had suffered discrimination under section 504 by the Veterans Administration's refusal to extend the time limit for the use of their educational benefits.[155] Veterans must use the benefits within ten years unless they were prevented from using them by "a physical or mental disability which was not the result of [their] own willful misconduct."[156] Because the Veterans Administration had consistently interpreted primary alcoholism as "willful misconduct" in all benefits statutes, the Supreme Court concluded that when Congress used the term in establishing the exception to the time limitation it intended to apply the long standing interpretation of willful misconduct. Furthermore, Congress's extension of section 504's prohibition against discrimination to include executive agencies indicated no intent to repeal the willful misconduct provision. In upholding the agency's denial of an extension, the Court emphasized that this is not a provision that treats handicapped persons less favorably than nonhandicapped persons but simply one that "provides a special benefit to disabled veterans who bear no responsibility for their disabilities."[157]

Section 504 prohibits discrimination in a person's job assignment and other working conditions. In a Nevada case, a handicapped teacher alleged discrimination on the basis of numerous facts: a temporary as opposed to a standard contract, the most difficult and demanding students, lack of normal assistance provided with the particular assignment, etc.[158] The federal district court, in awarding damages, stated that

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152. *Id.* at 597.

153. *See also* Wallace v. Veterans Admin., 683 F. Supp. 758 (D. Kan. 1988) (recovering drug abuser was a handicapped individual).

154. Chalk v. United States Dist. Ct. of Cent. Dist. of Cal., 840 F.2d 701 (9th Cir. 1988).

155. Traynor v. Turnage, 108 S. Ct. 1372 (1988).

156. 38 U.S.C. § 1662(a)(1).

157. *Id.* at 1382.

158. Recanzone v. Washoe County School Dist., 696 F. Supp. 1372 (D. Nev. 1988).

"[i]n no instance was an affirmative effort made to recognize and acknowledge Miss Recanzone's known handicaps and to make reasonable adjustments and accommodations for them. This was what the law required. She was discriminated against solely on the basis of her handicaps."[159]

In a Seventh Circuit Court of Appeals case, a director of nursing, who was diagnosed as having multiple sclerosis, was denied her position after a medical leave of absence.[160] In spite of her physician's report that she was able to resume her job, the employer maintained that she was not capable of performing the assigned duties and that she had failed to provide the additional assurances of her ability as required. The appellate court concurred with the federal district court that her job was denied solely because of her handicap. The physician's original report was found to be adequate to establish that she could perform her duties; the employer could not require additional assurances that were unrelated to the specific position.

A physician challenged that her hospital staff privileges were terminated "solely" because of her narcolepsy (sleeping problem) handicap.[161] In vacating a jury verdict in her favor, a Michigan federal district court concluded that the evidence overwhelmingly showed that the physician's abusive behavior towards patients and hospital staff was the primary reason for termination. Also, the court noted that some concern about the uncorrected sleeping condition and its threat to the safety and welfare of patients did not constitute discrimination.

Otherwise Qualified Individuals. To establish a cause of action under the Rehabilitation Act, handicapped persons must establish that they are "otherwise qualified" for the position sought and that they were excluded from the position solely by reason of their handicap. Under the Supreme Court's standard, an otherwise qualified person is "one who is able to meet all of a program's requirements in spite of [the] handicap."[162]

In 1987 the Supreme Court remanded *School Board of Nassau County, Florida v. Arline* to the district court to determine if a teacher with a contagious disease, tuberculosis, was otherwise qualified for an elementary school teaching position.[163] To assess whether the person is otherwise qualified, the court stated that the following factors must be evaluated:

> [findings of] facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of

159. *Id.* at 1378.
160. Carter v. Casa Cent., 849 F.2d 1048 (7th Cir. 1988).
161. Ross v. Beaumont Hosp., 687 F. Supp. 1115 (E.D. Mich. 1988).
162. Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979).
163. 107 S. Ct. 1123 (1987).

> the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities that disease will be transmitted and will cause varying degrees of harm.[164]

The federal district court assessed each point and concluded that Arline was otherwise qualified to hold her teaching position.[165] The risk of transmitting tuberculosis to another person was found to be minimal, especially when the infected person is taking medication. During the brief period of time in which Arline tested positive, no member of her family contracted the disease. Because of the medical treatment available, the court found that the risk was not severe at the time her employment was terminated. Furthermore, the court concluded that the probability Arline could transmit the disease to anyone was "so small as to not exist."[166]

The Ninth Circuit Court of Appeals granted a preliminary injunction ordering the reinstatement of a teacher with AIDS.[167] Although the district court acknowledged that little risk existed of transmitting the disease, a preliminary injunction was denied because doctors were not "completely certain."[168] Finding this to be an impossible burden, the appellate court held that the standard established in *Arline* must be followed. That is, an employee may be excluded only if there is "a *significant* risk of communicating an infectious disease to others."[169] The appellate court further disagreed with the district court's conclusion that the fear and apprehension in the community outweighed the teacher's injury. Basing a decision on irrational fears and myths was found to thwart the purposes of section 504.

An Ohio federal district court ruled that an applicant who had suffered a heart attack was not otherwise qualified for employment with the postal service.[170] His medical condition had not been diagnosed as stable and he was subject to exercise-induced or exercise-related extra heartbeats.

Reasonable Accommodation for Otherwise Qualified Individuals. An otherwise qualified handicapped person is one who can perform the essential functions of a position with "reasonable accommodation." Several courts held that an "otherwise qualified" person is not

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164. *Id.* at 1131.
165. Arline v. School Bd. of Nassau County, Fla., 692 F. Supp. 1286 (M.D. Fla. 1988).
166. *Id.* at 1291.
167. Chalk v. United States Dist. Ct. of Cent. Dist. of Cal., 840 F.2d 701 (9th Cir. 1988).
168. *Id.* at 707.
169. *Id.* at 708, *quoting* School Bd. of Nassau County, Fla., v. Arline, 107 S. Ct. at 1131 n.16 (emphasis added).
170. Bailey v. Tisch, 683 F. Supp. 652 (S.D. Ohio 1988).

simply someone who is able to meet *all* of the job requirements in spite of a handicap as specified in the Supreme Court's decision in *Southeastern Community College v. Davis*.[171] An essential aspect of assessing whether a person is "otherwise qualified" is determining whether reasonable accommodation would enable the individual to perform the job.[172] The Fifth Circuit Court of Appeals in discussing the meaning of "otherwise qualified" stated: "on the one hand, it refers to a person who has the abilities or characteristics sought by the grantee; but on the other, it cannot refer only to those already capable of meeting *all* the requirements—or else no reasonable requirement could every violate [section] 504, no matter how easy it would be to accommodate handicapped individuals who cannot fulfill it."[173]

Reasonable accommodation, however, does not require elimination or modification of an essential function of a position or program. In a case involving a handicapped postal service employee, the Sixth Circuit Appellate Court reversed a summary judgment and remanded the case for an individual determination of whether certain physical requirements were *essential* to the actual functioning of a position, not merely specified in the job description.[174] The Kansas Federal District Court held that accommodation was required for a nurse suffering from drug addiction.[175] While the hospital argued that a registered nurse must administer narcotics to patients, the court found this to constitute less than 2% of a nurse's time and concluded that reasonable accommodation could be made with job sharing or controlled patient assignments to enable the nurse to perform the essential functions of the position.

On the other hand, the Third Circuit Court of Appeals ruled that even if a police officer who was dismissed for drug use was a handicapped person he was not "otherwise qualified" to hold a law enforcement position. The court stated that "accommodating a drug user within the ranks of the police department would constitute a 'substantial modification' of the essential functions of the police department and would cast doubt upon the integrity of the police force."[176] An Ohio federal district court ruled that a paranoid schizophrenia employee who refused to take prescribed medication, which controlled her belligerent and violent behavior toward co-workers and the public, was not "otherwise qualified."[177] The employer was found to have made reasonable ac-

171. 442 U.S. 397 (1979).

172. *See* Brennan v. Stewart, 834 F.2d 1248 (5th Cir. 1988); Hall v. United States Postal Serv., 857 F.2d 1073 (6th Cir. 1988).

173. Brennan v. Stewart, 834 F.2d 1248 (5th Cir. 1988).

174. Hall v. United States Postal Serv., 857 F.2d 1073 (6th Cir. 1988).

175. Wallace v. Veterans Admin., 683 F. Supp. 758 (D. Kan. 1988).

176. Copeland v. Philadelphia Police Dep't, 840 F.2d 1139, 1149 (3d Cir. 1988).

177. Franklin v. United States Postal Serv., 687 F. Supp. 1214 (S.D. Ohio 1988).

commodation by reinstating her twice after violent incidents. Similarly, the District of Columbia Federal District Court held that a manic-depressive employee was not "otherwise qualified" because she was unable to perform an essential function of the job—to report to work and perform duties for the duration of the day.[178]

A handicapped employee cannot demand specific accommodations. In a Michigan case, the federal district court ruled that an employer's reassignment recognizing an employee's physical limitations provided reasonable accommodation; the employer was not required to transfer the employee to a position closer to her residence.[179] Additionally, most courts have held that accommodation must be made only in the position for which an individual was hired. The Maryland Federal District Court, however, ruled that an employer's established policy of reassigning handicapped employees to alternative jobs required consideration for all positions to which the employee might be reassigned.[180]

178. Matzo v. Postmaster Gen., 685 F. Supp. 260 (D.D.C. 1987).

179. Fowler v. Frank, 702 F. Supp. 143 (E.D. Mich. 1988).

180. Coley v. Secretary of Army, 689 F. Supp. 519 (D. Md. 1987). *See* Robinson v. School Dist. No. 1, Multnomah County, 759 P.2d 1116 (Or. App. 1988). Under Oregon law, a school district was not required to rehire a disabled teacher who did not hold the advanced degrees or certificates to quality for the available positions.

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TORTS

William J. Evans, Jr.

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INTRODUCTION

A tort is a civil wrong, other than breach of contract, for which a court provides relief in the form of damages. State laws provide the basis for most actions, which are predicated on the principle that individuals are

responsible for the consequences of their conduct.[1] The purpose of tort law is to offer remedies to individuals for harm which resulted from the unreasonable conduct of others. The major categories into which tort actions can be grouped are: negligence, which involves conduct that falls below an acceptable standard of care resulting in injury; intentional torts, where such actions as assault, battery, defamation, trespass, and false imprisonment are committed with the desire to do harm; and strict liability, where an injury results from the creation of an unusual hazard.[2]

Most of the more common torts developed historically and have been recognized for centuries. But tort law is not static and the emphasis on the type of duty owed by one individual to another shifts. For example, plaintiffs which previously might have brought suit claiming intentional infliction of emotional distress or assault and battery today may claim a violation of constitutional rights. In the area of products liability, the largest area of litigation continues to involve costs related to asbestos removal.

This chapter examines cases reported during 1988 which involved tort claims within the school context. Cases involved school officials, employees, and students. Torts arising out of physical education and intramural sports participation are included, but those involving interscholastic or intercollegiate sport participation are discussed in Chapter 6.

NEGLIGENCE

Negligence is the most common tort alleged to have been committed by school personnel. Such a charge can result when an improper act, or a failure to act, causes injury to another person. For negligence to exist, the person causing the injury must fail to exercise a standard of care commensurate with the risks involved and the duty owed to the injured party.

There also must be a causal relationship between the alleged negligent conduct and the injury sustained. In negligence cases, questions of law are determined by judges, while questions of fact are decided by juries.

Student Injuries

Schools are responsible for maintaining a safe and healthy environment in which learning can take place. The following cases illustrate how injuries to students resulted in a variety of lawsuits with varying outcomes.

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1. *See generally*, W. Prosser, Law of Torts (4th ed. 1971).
2. *See* M. McCarthy & N.H. Cambron-McCabe, Public School Law (1987).

An action was brought against a New York school district for its failure to timely report the results of a scoliosis test performed on a student. The student's condition was aggravated during the intervening fourteen months. The trial court's denial of the school district's motion to dismiss the case was reversed by the appeals court.[3] The court explained that a reading of the provisions of Education Law[4] indicated that the legislature did not intend to impose liability for either the making of tests, for the failure to make tests, or for a failure to report the results of tests. While the law requires school districts to report the results of eye and hearing tests and tests for sickle cell anemia, there was no such requirement for scoliosis.

Off School Property. In Louisiana, the parents of children who were sexually abused by another child brought an action against the school district of the abuser. The parents contended that the district did nothing to control the child's behavior or to warn parents of children who were his potential victims. The trial court's decision for the school district was affirmed on appeal.[5] The incidents had taken place during summer vacation, away from school grounds, and against children who were not students. Furthermore, the plaintiffs were unable to establish that the district was aware of the abuser's problems, and they were unable to cite a statute or case imposing the duty they suggested the school district breached.

While waiting for the school bus, a six-year-old kindergarten student was injured when a rock thrown by an older student hit him in the face. An action for damages was brought against the New York town and school district on behalf of the infant. The plaintiff's appeal of the trial court's summary judgment was unsuccessful.[6] The court saw no breach of duty by the district in the selection of a reasonably safe location for the bus stop. No duty was found owed by the district to prevent older students from mingling with younger students at the same bus stop as the students were not yet under the custody or control of the district. Finally, the conduct of the district was not seen as the proximate cause of the injury. The sole cause was the unforeseeable act of the older student.

A compromise settlement was made between the parents of an injured five-year-old and the Tennessee school district which operated the bus which injured her as she crossed a street. A later action was brought on behalf of the minor seeking to set aside the previous court

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3. Bello v. Board of Educ., 527 N.Y.S.2d 924 (App. Div. 1988).
4. *Id.* at 925.
5. Morris v. Canipe, 528 So. 2d 659 (La. Ct. App. 1988).
6. Fornaro v. Kerry, 527 N.Y.S.2d 61 (App. Div. 1988). *See* Scott v. Blanchet High School, 747 P.2d 1124 (Wash. 1987) (in denying recovery for injuries to a student as a result of an alleged sexual relationship with a teacher, the court held that there had not been a breach of any implied contract to provide morally fit teachers).

approval of the compromise settlement. The decision to set aside the approval and remand the case for trial was affirmed upon appeal.[7] The court explained that fairness and equity demanded that the minor's rights be protected. She had sustained serious injuries and had no representation at the hearing to determine the reasonableness of the settlement.

School Settings During School Hours. Two Pennsylvania elementary school students were sexually assaulted on school grounds by a teacher at their school. The teacher pleaded guilty to charges of involuntary deviate sexual intercourse and was sentenced to prison. Action was brought against the school district asserting state tort and federal civil rights claims. The appeals court upheld the determinations made by the trial court.[8] The district and officials were not within the real property or willful misconduct exceptions to immunity from state tort claims. Although the windows in the office where the students were assaulted were covered with posters, this was not seen as the cause of the injuries. Likewise, the allegations of gross and culpable negligence and wanton and reckless behavior were not seen as the legal equivalent of willful and intentional misconduct. The civil rights claims were not recognized as there was failure to establish intentional racial discrimination, or a special relationship between the students and officials upon which civil rights liability could be based.

Parents of a seven-year-old Louisiana girl, who was abducted from school and raped, sought an increase in the award of $65,000 in medical and general damages.[9] The appeals court upheld the award explaining that the appellants failed to prove that future psychological or psychiatric treatment was more than a speculative possibility.

Parents of a Missouri elementary school student brought suit against the principal for negligent supervision of children. Following a decision in favor of the principal, the parents appealed.[10] The plaintiffs contended that the trial court erred in overruling objections to portions of the defense counsel's closing arguments. In particular, he made reference to the juror's own children and grandchildren which personalized the case and impaired their ability to act impartially. In rejecting that claim, the court recognized that asking jurors to put themselves in the position of a party in question is usually improper. However, with the references made in this instance, the counsel was seen as merely asking the jurors to

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7. Thomas v. R.W. Harmon, Inc., 760 S.W.2d 212 (Tenn. Ct. App. 1988).

8. Scott v. Willis, 543 A.2d 165 (Pa. Commw. Ct. 1988).

9. McGraw v. Orleans Parish School Bd., 519 So. 2d 847 (La. Ct. App. 1988). *See* Olsen v. Special School Dist. No. 1, 427 N.W.2d 707 (Minn. Ct. App. 1988) (statute discounting future damages awarded as a result of injuries incurred by a student in gym class was found not to apply as the case was pending when the law became effective).

10. Haynes v. Green, 748 S.W.2d 936 (Mo. Ct. App. 1988). *See* Steinberg v. Lomenick, 531 So. 2d 199 (Fla. Ct. App. 1988) (jury need not be instructed of evidence of negligence where a defendant violated its own rules of conduct).

use their common sense and familiarity with human traits to guide their deliberations.

The competency of a second-grade student's testimony was the sole issue on appeal of a case involving an Illinois student's injury.[11] He had testified regarding the use of a door which had closed on his hand. The court held that the question of the competency of a child must be raised at the time of trial, not for the first time in a court of review.

The alleged negligence of a Louisiana physical education teacher was at issue following a student's injury. The action alleged that improper instruction and supervision of a wrestling class was the proximate cause of the student's injury. The appeals court affirmed the lower court decision for the school board and teacher.[12] The court found proper the exclusion of witnesses for the plaintiff whose names had not been made available to the defense in a timely manner. Additionally, testimony on how another teacher conducted his class in the year following the accident was excluded as irrelevant. The teacher's methods of teaching his class were not found substandard to the extent that they created an unreasonable risk of injury.

Seven Massachusetts towns formed a regional school district in 1968. Following an assault on a student by a guidance counselor, a complaint alleging negligent hiring and supervision was filed against the towns and members of the regional school district administration. The trial court's dismissal of the action was reversed on appeal, and the case was remanded for further action.[13] The court determined that substantial issues of material fact existed as to whether due care had been exercised in the hiring and supervision of the counselor.

En route to and from School. A seven-year-old girl was killed when she was struck by an automobile at a school crossing. The city had maintained a crossing guard at the site for approximately two and one half years, and had intentionally removed the guard. The girl's parents sued the city for removing the guard without putting into place any warning signs or alternative safeguards. The Texas trial court's summary judgment for the city was reversed by the court of appeals and the case was remanded for trial.[14] The court concluded that the city was not acting solely in its governmental capacity, but was performing proprietary functions as well when it took actions concerning the crossing guard.

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11. Swanigan v. Chicago Bd. of Educ., 527 N.E.2d 1030 (Ill. App. Ct. 1988).
12. Llorence v. Natchitoches Parish School Bd., 529 So. 2d 479 (La. Ct. App. 1988).
13. Doe v. Town of Blandford, 525 N.E.2d 403 (Mass. 1988).
14. Guillory v. City of Beaumont, 746 S.W.2d 16 (Tex. Ct. App. 1988). *See* Pierce County School Dist. v. Greene, 363 S.E.2d 825 (Ga. Ct. App. 1987) (school district's appeal of an award failed as the jury had not been improperly instructed on the legal definition of a crosswalk).

Summary judgment in favor of a Washington school district and crossing guard was denied when a court of appeals reversed a trial court decision.[15] An elementary school student had been struck and killed by an automobile while attempting to cross the street. When the traffic light had turned to walk, the guard signaled across the street for the student to proceed. The crossing guard saw the approaching vehicle, but believed it would come to a stop. The car, which was being operated by an eighty-three-year-old man, never slowed from its approximate speed of thirty miles an hour. The guard's shouts to the student to turn back were ineffective. The appeals court saw issues of genuine common law negligence which served to preclude a summary judgment. The school district argued that the school district stood *in loco parentis* to the child and like a parent was immune from liability based on ordinary negligence. The court disagreed explaining that the correct rule is that a school is liable for its acts or omissions according to the normal rules of tort law.

In a wrongful death action against a Missouri school district and bus driver, the trial court entered a judgment in favor of the defendants. On appeal, that decision was reversed and a new trial ordered.[16] Evidence presented regarding the driver's good character and good driving record were ruled inadmissible. The information on the driver's character was seen as irrelevant in a civil action. The evidence that the driver had a good record did not establish that he was not negligent at the time the fatal accident occurred.

School Buildings and Grounds. A Missouri child, who was playing football on a school playground, was struck and injured by an automobile attempting to park. A suit for injuries was brought against the driver, the school district, and the board of education alleging improper use of the playground. The trial court entered a judgment in favor of the district, board, and driver which was upheld on appeal.[17] The court found the child 100% at fault by having run into the slowly moving car. The school district and board were immune from liability as no defect in the condition of the playground was alleged.

Two 1987 cases dealt with the marking of play areas. In Ohio, a school district was found liable for willful and wanton misconduct in failing to attach a warning flag to a cable at the entrance to a school's

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15. Christensen v. Terrell, 754 P.2d 1009 (Wash. Ct. App. 1988).

16. Williams v. Bailey, 759 S.W.2d 394 (Mo. Ct. App. 1988). *See* Poston v. Barnes, 383 S.E.2d 888 (S.C. Ct. App. 1987) (evidence whether a school district removed seatbelts from a van was ruled admissible on a question of negligence in an accident which injured a student); Lindburg v. Mt. Pleasant Indep. School Dist., 746 S.W.2d 257 (Tex. Ct. App. 1987) (high degree of care is owed to students riding on a school bus rather than the standard of ordinary care).

17. Wilson v. Stephens, 757 S.W.2d 297 (Mo. Ct. App. 1988).

play area.[18] In Louisiana, a knee-high cable fence on school grounds was not found to present an unreasonable risk of harm.[19]

An action was brought on behalf of an Illinois student who was injured when he fell from a slide at school. Appeal was taken when the trial court dismissed the action.[20] The school district was charged with negligence-premises liability in allowing a twelve-foot slide on an asphalt surface without protective padding, or protective railings. Furthermore, the district was alleged to have acted in a willful and wanton manner by consciously allowing the dangerous condition to exist. The appeals court agreed with the lower court determination that the district's conduct did not rise to the level of willful and wanton actions. However, the plaintiffs did prevail on the issues of negligent premises. Allowing the slide on the playground without guardrails was found to disregard the safety of children.

School-related Activities. The lack of supervision of a Louisiana school's playground was established in a case where a student was injured before school started. The school had a breakfast program which began daily a half-an-hour before schoolyard supervision started. The student was injured when he went outside to play after eating breakfast. Although the trial court dismissed the parent's action for damages, that decision was reversed on appeal. The court recognized that the school had no duty to supervise the playground at all times. However, the district was found negligent by failing to either supervise the playground during the breakfast period, or prevent students from going outside during that time.[21]

The plaintiff in an action against an Alabama school board was injured when he fell down an embankment on the grounds of a local high school. He had arrived for the purpose of attending a school-sponsored beauty pageant. He fell after parking his car, but before purchasing his ticket at the school auditorium. The action was centered on the basis of implied warranty and implied contract. In affirming the trial court's decision for the school district, the appeals court explained that the board's liability to persons purchasing admission to school sponsored activities did not apply as the plaintiff was injured prior to paying admission.[22]

EDUCATIONAL MALPRACTICE

The first and most vital teacher duty is to provide students with

18. Highfield v. Liberty Christian Academy, 518 N.E.2d 592 (Ohio Ct. App. 1987).
19. Lejeune v. Acadia Parish School Bd., 517 So. 2d 1030 (La. Ct. App. 1987).
20. Kirby v. Macon Pub. School Dist. No. 5, 523 N.E.2d 643 (Ill. App. Ct. 1988).
21. Lancheart v. Orleans Parish School Bd., 524 So. 2d 138 (La. Ct. App. 1988).
22. Brown v. Covington Bd. of Educ., 524 So. 2d 623 (Ala. Ct. App. 1988).

adequate and proper instruction. There are two basic judicial interpretations of the term instruction. First, students should not be subjected to an activity in school unless first receiving complete instruction from the teacher in how to carry out the activity. Second, teachers owe their students proper instruction that will lead the students to the mastery of certain basic skills and subject matter. This latter type of instruction was at issue in court this past year. The mother of three Washington students brought an action against the school district for failure to provide adequate instruction. The complaint alleged a violation of specific statutes under the Washington Basic Education Act. This included the failure to teach the state constitution. The trial court granted summary judgment to the school district and the mother appealed.[23] The court determined that the allegations did not state a cause of action under the Washington or United States constitutions. Explaining that courts and judges are normally not in a position to substitute their judgment for that of school authorities, the action by the mother was found frivolous. Such a determination allows the court to order sanctions against the party bringing the appeal, including compensatory damages and an award of attorneys' fees to the opposing party.

The mother of a Louisiana kindergarten student brought an appeal of a judgment in an action for damages allegedly resulting from being paddled.[24] In the appeal, the m]other sought to enlarge the pleadings to introduce evidence concerning the evaluation policies for children with special needs or problems. She contended that the school board was negligent in failing to evaluate her son, and as a result he suffered educational damages. The court found no evidence or testimony to conclude there was an enlargement of the pleadings to assert a claim for educational damages. The trial court committed no error for failing to address additional grounds of recovery.

NEGLIGENCE DEFENSES

Immunity

Traditionally, courts have been reluctant to disturb a school district's claim of governmental (sovereign) immunity. School districts are state agencies, created by state law, to perform a governmental function. Although there have been legislative and judicial inroads restricting this defense, it continues to be the one most commonly asserted.

There are a variety of ways in which a statute can limit the liability of a school district. A monetary limit can be placed on the maximum claim

23. Camer v. Seattle School Dist. No. 1, 762 P.2d 356 (Wash. Ct. App. 1988).
24. Abraham v. Lafayette Parish School Bd., 534 So. 2d 49 (La. Ct. App. 1988).

a successful plaintiff can recover, or governmental immunity can be limited by specific statutory exceptions. Litigation in this area generally seeks to test the limits of the statute or its exceptions.

Common Law (Governmental Immunity). A Georgia student was injured when he was thrown from the back of a pickup truck while delivering wrestling mats from one school to another. The school district claimed sovereign immunity as its defense in the action brought by the student. In affirming the trial court's judgment for the district, the appeals court explained the role of insurance coverage.[25] A governmental entity waives its sovereign immunity to the extent of its coverage. As there was no coverage for a particular student claim, there was no waiver of sovereign immunity.

A physically and mentally handicapped child was placed by the school district in a facility owned and operated by the Wyoming Board of Cooperative Educational Services. While there, the child sustained injuries for which his parents sought damages from the school district. The appeals court affirmed the judgment for the school district.[26] For the purposes of the Governmental Claims Act, the Board of Cooperative Educational Services was ruled to be a governmental entity. As such, its employees were not employees of the school district whose liability could be vicariously imputed to the school district.

A Michigan high school senior was killed when she fell from a homecoming float which was being towed to the site of a parade. The school district was charged with negligent supervision in the suit filed on behalf of the student. The trial court's decision finding the school district immune from liability was upheld by the court of appeals.[27] The court saw the school district as impliedly authorized to sponsor a homecoming program which included a parade. Therefore, the district's decision regarding supervision of the event was made within the exercise of its governmental function.

Also in Michigan, a high school had erected speed bumps in the school's driveway. A motorcyclist, carrying a passenger, drove up on the school's sidewalk in order to avoid the bumps. He collided with a truck coming from the opposite direction which had also attempted to avoid the bumps. The passenger on the motorcycle brought suit against the school district for damages resulting from the accident. The trial court found in favor of the district and the passenger appealed.[28] The court of

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25. Dugger v. Sprouse, 364 S.E.2d 275 (Ga. Ct. App. 1988).

26. Sykes v. Lincoln County School Dists. 1 & 2, 763 P.2d 1267 (Wyo. 1988). *See* LeRose v. City of Zion, 696 F. Supp. 1222 (N.D. Ill. 1988) (it was found a matter for trial whether a school district and police officer attached to school district are entitled to immunity in a wrongful death action).

27. Eichhorn v. Lamphere School Dist., 421 N.W.2d 230 (Mich. Ct. App. 1988).

28. Scamehorn v. Bucks, 421 N.W.2d 918 (Mich. Ct. App. 1988).

appeals affirmed that decision finding that the speed bumps were fit for the use for which they were intended and therefore did not create a defect in a public building exception to the district's immunity. Additionally, the accident was seen as a result of an intention to avoid using the bumps for their intended purpose.

A Virginia physical education teacher was charged with negligence after a student was injured in class while playing football without protective equipment. The trial court's decision that the teacher was protected by the doctrine of sovereign immunity was affirmed on appeal.[29] The court explained that the teacher was an employee of an immune governmental entity charged with simple negligence in the supervision and control of the class to which he was assigned. The facts were not found to support a charge of gross negligence or intentional misconduct.

A Michigan student who injured his hand on a milling machine during shop class brought an action against the school. He claimed that the machine was not equipped with the proper safety guard, and as such fell under the real property exception to immunity. The trial court disagreed and granted summary judgment in favor of the school. That decision was reversed on appeal.[30] The court accepted that the 1,000 pound milling machine was a part of the reality, even though it was only attached by its weight and through its electrical connection. As schools are liable for injury resulting from dangerous or defective conditions in their buildings, the case was remanded for further consideration.

The real property exception also was at issue in two Pennsylvania cases. The results, however, were different. In the first, a student was injured while attempting to hang on a chin-up bar. The bar, which was located in the arch of a doorway leading to a gymnasium storeroom, became dislodged and struck the student in the face and mouth. Summary judgment was granted in favor of the school district by the trial court. That holding was affirmed on appeal with the court determining that the bar was movable and therefore not a fixture which would place it under the real property exception to immunity.[31]

In the other case, a sixteen-year-old student was rendered a quadraplegic when he fell from a set of gymnastic rings during his gym class. In his action against the school district, the appeals court affirmed the trial court's summary judgment for the district.[32] The court held that the real estate exception can only be applied in cases where the artificial condition or defect of the land itself is the cause of the injury. It does not apply in instances where it only facilitates the acts of others, as in this case

29. Lentz v. Morris, 372 S.E.2d 608 (Va. 1988).
30. Velmer v. Baraga Area Schools, 424 N.W.2d 770 (Mich. Ct. App. 1988).
31. Gore v. Bethlehem Area School Dist., 537 A.2d 913 (Pa. Commw. Ct. 1988).
32. McCloskey v. Abington School Dist., 539 A.2d 946 (Pa. Commw. Ct. 1988).

where the injury was a result of the student's own actions.

Statutory Immunity. Following an injury to a student participating in an Illinois physical education class, suit was brought for recovery of medical bills. Named were the instructor, superintendent, principal, and their immediate inferiors. The appeals court affirmed the decision that since the teacher and the administrators were statutorily immune from liability, such immunity extended to their immediate inferiors.[33] The plaintiffs had charged that certain nonteaching personnel had failed to properly forward doctor's notes exempting the student from physical education class.

A North Carolina substitute teacher was accused by students of physical abuse while disciplining them. The school's principal reported the accusations to the Department of Social Services and the Assistant Superintendent of Personnel. Following a police investigation, the teacher was charged with assault. After being acquitted, the teacher charged the principal with malicious prosecution, defamation, intentional infliction of emotional distress, and negligence for reporting the allegations. The trial court found for the principal, and the teacher appealed.[34] The appeals court affirmed the decision citing the statutory immunity from civil and criminal liability to anyone who makes a report or otherwise participates in a program for reporting suspected child abuse.

Other Defenses

Notice of Claim. A New York teacher injured her back while lifting two boxes of teaching material. The workers' compensation board excused her failure to give timely notice and the school district appealed.[35] The court upheld the board's ruling since the teacher had sought prompt medical treatment, and the initial request for verification of the incident was rejected by the school official to whom it had been reported.

Suit was brought against a Nebraska school district for the amount due on material supplied to a private contractor hired by the district to renovate a school building. The district had failed to comply with the statutory requirement that a contractor's bond be posted to protect the material supplier's interest. The district court dismissed the action for lack of jurisdiction. That decision was reversed by the appeals court, citing the applicability of the Political Subdivisions Tort Claims Act.[36] Notice of the claim was found timely and the district was held liable.

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33. Hopwood v. Elmwood Community High School Dist. 322, 525 N.E.2d 247 (Ill. App. Ct. 1988).
34. Davis v. Durham City Schools, 372 S.E.2d 318 (N.C. Ct. App. 1988).
35. Yagaloff v. Lincoln Hall, 525 N.Y.S.2d 379 (App. Div. 1988).
36. Chicago Lumber v. School Dist. No. 71, 417 N.W.2d 757 (Neb. 1988).

A white Massachusetts high school student was involved in two fights at school. Press reports linked the fights to racial tensions. One article, which was carried by a national wire service, falsely reported statements portraying the student as a racist and member of the Ku Klux Klan. The student brought an action against the news media for libel, infliction of emotional distress, invasion of privacy, and violation of civil rights. The appeals court upheld the lower court decision that the student's action was barred by the three-year statute of limitations.[37] Although the student claimed not to know of the wire service article until six years after it was published, neither the harm nor the article was found inherently unknowable at the time of publication.

The father of a Massachusetts second-grade student brought an action against the town for damages for injuries received by the student during a school-yard incident. The appeals court upheld the trial court decision absolving the town from liability. The function of supervising students in the school yard was seen as discretionary and therefore an exception to the Tort Claims Act. This exception was not seen to apply to the charge that school personnel failed to seek immediate medical attention for the student. However, the presentment letter giving notice to the town had not stated that claim. The purpose of presentment is to insure that the responsible public official receives notice of a claim so that the official can investigate its validity, and take steps to ensure that similar claims will not be brought in the future. The court held that, having deprived the town of these opportunities, an action on a theory of failure to provide medical attention could not be maintained.[38]

An applicant for a Wyoming teaching position brought an action against the school principal alleging breach of an implied contract of employment. The trial court denied that claim on the basis that the action was barred by the Governmental Claims Act statute of limitations. That decision was reversed on appeal.[39] The court held that by offering a teaching position, without the approval of the Board of Trustees, the principal had acted outside the scope of his duties. Therefore, the one-year statute of limitations was not applicable.

A woman who slipped on a damp spot in a New York school's hallway sought leave to serve a late notice of claim for her injuries. The

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37. Flynn v. Associated Press, 519 N.E.2d 1304 (Mass. App. Ct. 1988).

38. Wightman v. Town of Methuen, 526 N.E.2d 1079 (Mass. App. Ct. 1988).

39. Milton v. Mitchell, 762 P.2d 372 (Wyo. 1988). *See* McKenna v. Prudential Ins. Co. of Am., 539 A.2d 1266 (N.J. 1988) (school board's failure to notify an employee that his retirement was approved served to extend the period during which he could convert his death benefit); Scott v. Burden, 527 So. 2d 468 (La. Ct. App. 1988) (21 months following the incident the school board can still be added as a joint tort-feasor with the parents of a student who stabbed a classmate).

appeals court affirmed the denial of her application.[40] The woman had retained counsel well within the ninety-day period for serving a notice of claim. The court cited the transitory nature of the condition which allegedly caused the action, as well as the failure to provide a valid excuse for the delay.

Comparative Negligence. An Illinois high school student was awarded $16,000 in damages for injuries sustained when she stepped from a school bus and was struck by a pickup truck. In seeking to have the amount of the judgment raised, she submitted medical bills totaling over $13,000. The court of appeals held that the award was not inadequate, even if it was not generous. Although the award had been cut by 80% based on comparative negligence, the court explained that even if the jury's verdict had been less than the claimed damages it would not necessarily be considered inadequate.[41]

The jury instructions given by a Missouri court were at issue in a case where a student was injured when he rode his bicycle into a cable placed across the entrance to a school's playground. In upholding the school district's right to a new trial, the appeals court held that comparative negligence instruction describing the acts by the student was not supported by the evidence. The language of the instructions was found to have likely had a prejudicial impact.[42]

A New York school employee sought damages for an alleged sexual assault on school grounds. After the trial court decision for the school board, the employee sought appeal on the grounds of an improper charge to the jury. Specifically, the employee objected to the charge on comparative negligence.[43] The appeals court affirmed the decision, noting that the employee had indicated her fear concerning her safety in the building during off-hours. It was found reasonable for the jury to examine the employee's obligation to ascertain who was knocking at her door prior to unlocking and opening it.

LIABILITY INSURANCE

The interpretation of policy language was the primary issue in a case where an employee in Washington brought an action to recover for the

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40. D'Andrea v. City of Glen Cove Pub. Schools, 533 N.Y.S.2d 456 (App. Div. 1988). *See* LaCroix v. Board of Educ., 844 F.2d 88 (2d Cir. 1988) (action brought 15 years after the termination of a contract was untimely and not subject to the Accidental Failure of Suit Act where the plaintiff chose not to pursue the claim when he had the chance). For two cases decided on largely technical grounds, *see* Airefco, Inc. v. Yelm Community Schools No. 2, 758 P.2d 996 (Wash. Ct. App. 1988); McPherson v. Brownard County School Bd., 527 So. 2d 238 (Fla. Dist. Ct. App. 1988).

41. Collins v. Straka, 517 N.E.2d 1147 (Ill. App. Ct. 1987).

42. Nakata v. Platte County R-3 School Dist., 750 S.W.2d 699 (Mo. Ct. App. 1988).

43. Louise B.G. v. New York City Bd. of Educ., 533 N.Y.S.2d 293 (App. Div. 1988).

loss of function of his foot due to a spinal injury.[44] The policy caption indicated that coverage was only for accidental death and dismemberment. In holding for the employee, the court explained that a caption should never of itself be taken to override the intention of the parties to an insurance policy. If a policy is ambiguous, a meaning and construction most favorable to the insured must be applied.

A Pennsylvania school district brought an action against its liability insurer for breach of contract. Shortly after the insurers were awarded the contracts, they cancelled the policies pursuant to the cancellation clause. This necessitated the school district to obtain coverage from another insurer at a substantially higher rate. In its suit, the district sought reimbursement for the difference in rates. The trial court's dismissal of the action was affirmed upon appeal.[45] The court explained that even though the original bid specification did not contain cancellation provisions, the policies properly provided such clauses as required by insurance company law.

In an effort to recover policy proceeds, the wife of a deceased Illinois school district employee brought an action against the insurer, school district, and various officials. After a settlement and dismissal of claims against the district and the officials, the trial court found for the insurer. That decision was upheld by the appellate court which found that the beneficiary had failed to comply with notice and proof of claim provisions of the policy.[46] Although the wife did not become aware of the policy issued by the school district until the one year claim period had passed, she failed to file a claim until nearly three years later.

A New York school board alleged breach of contract when its liability insurer failed to pay the board's expenses for defending against a segregation suit.[47] In appealing the trial court's decision for the board, the insurer claimed the policy excluded defense costs attributable to racial discrimination claims. The court of appeals disagreed, recognizing two classes of expenses. Legal fees were seen to accrue from the outset

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44. Stanley v. SAFECO Ins. Co. of Am., 747 P.2d 1091 (Wash. 1988). *See* Allstate Ins. Co. v. Diamant, 518 N.E.2d 1154 (Mass. 1988) (court held that "bodily injury" and "personal injury" are not synonyms in insurance law—bodily injury is a narrower term which does not encompass emotional distress); Continental Casualty Co. v. McAllen Indep. School Dist., 850 F.2d 1044 (5th Cir. 1988) (board of education's liability policy excluded coverage for student's injury although the board argued the claim was constitutional and not subject to exclusion).

45. Clairton City School Dist. v. Mary, 541 A.2d 849 (Pa. Commw. Ct. 1988). *See* Dayton Indep. School Dist. v. National Gypsum Co., 682 F. Supp. 1404 (E.D. Tex. 1988) (insured manufacturer of asbestos, who settled claims brought against it by school districts, was granted indemnification from excess liability insurers).

46. Fletcher v. Palos Community Consol. School Dist., 518 N.E.2d 363 (Ill. App. Ct. 1987).

47. Board of Educ. Yonkers City School Dist. v. CNA Ins. Co., 839 F.2d 14 (2d Cir. 1988).

of a dispute and therefore differ from expenses for remedial programs which become necessary only after discrimination has been established.

The dismissal of an employee resulted in a successful civil rights action against a Wyoming school district. A further action developed over the question of whether the school board was covered under its liability policy. The trial court's decision for the school board was reversed on appeal.[48] The insurance policy language denying coverage was found clear and unambiguous. Since the members of the school board were not individually liable in the civil rights judgment against the school district, the district had no need to indemnify them. The policy, which was limited to indemnity did not cover the judgment.

Five children and one teacher were killed when a hot water heater in an Oklahoma elementary school exploded. Parents of children who were killed or injured brought suit against the school district, three employees, and various manufacturers. The insurance carrier tendered $300,000 to the court as the school district's maximum liability required by the district's insurance policy. The district court ruled that the payment, once divided among the various plaintiffs, relieved the defendants of all liability. The plaintiffs appealed, but the decision was upheld by the Oklahoma Supreme Court.[49] A legitimate governmental purpose was seen in imposing a limit on the amount of damages recoverable from governmental entities. The court also recognized that perfect equality of treatment in the awarding of damages to the victims of governmental tortfeasors could never be achieved. Thus, a legislative decision to limit liability to a specified sum for two or more persons injured in a single accident was seen to bear a reasonable relationship to a legitimate government goal. Finally, the doctrine of sovereign immunity was not found to violate due process rights, where children can be compelled to attend school and yet have liability limited when they are injured.

ATTORNEY FEES

A New York teacher, who had successfully defended himself against a criminal charge of sexual abuse of a student, brought an action against his school district to recover for legal fees. The teacher appealed the trial court's dismissal of the case.[50] The court found the dismissal proper, as

48. St. Paul Fire & Marine v. Albany County School Dist. No. 1, 767 P.2d 1255 (Wyo. 1988).

49. Wilson v. Gipson, 753 P.2d 1349 (Okla. 1988). *See* Wilson v. Unsatisfied Claim and Judgment Fund Bd., 536 A.2d 752 (N.J. 1988) (passenger in an uninsured vehicle may recover personal injury protection from the Unsatisfied Claim and Judgment Fund despite the availability of a claim against a driver who was insured by the school district).

50. Lamb v. Westmoreland Cent. School Dist., 533 N.Y.S.2d 157 (App. Div. 1988).

the district's statutory authority to defend a teacher in a criminal action only arises out of disciplinary action taken against a pupil. Without such authority, a public employer who paid attorney fees for its employee's legal actions would be making a gift of public funds for a private purpose. The court explained that this would be prohibited, even if the actions arose from acts performed in the employee's legal capacity.

EMPLOYEE INJURIES/WORKERS' COMPENSATION

A New York City teacher, who was injured while trying to break up a fight between two high school students, used a novel approach in an attempt to recover damages from a governmental entity.[51] Failing to establish that his status as an employee created a requisite special duty to protect him from the students, the teacher addressed another of the city's roles. He claimed that as a landlord, the defendants were negligent by placing the students in the same classroom thus creating an unsafe workplace. The appellate court upheld the trial court's decision to dismiss the claim, explaining that the classroom assignment of students was an educational decision with no connection to the defendant's function as a landlord.

A cafeteria worker in Texas was injured when she received an electrical shock to her left hand. In upholding her claim, the court determined that expert testimony was not necessary to establish that injury to her right hand was caused by the shock to her left hand.[52]

An Oregon school employee injured her hips when she slipped on some steps. The Workers' Compensation Board allowed medical treatment, but denied a claim of partial permanent disability. The employee sought further medical treatment when her condition worsened. The appellate court held that the original finding did not bar an assertion of later claims for medical expenses.[53]

A Louisiana school janitor, who suffered a heart attack two days after complaining of chest pains, sued to recover workers' compensation benefits, medical expenses, attorney fees, and penalties. The trial court awarded the worker everything except the penalties and attorney fees.

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51. Bisignano v. City of N.Y., 524 N.Y.S.2d 49 (App. Div. 1988). *See* Johnson v. Harlan Community School Dist., 427 N.W.2d 460 (Iowa 1988) (subrogation rights of employer and insurance carrier included the cost of medical and hospital services paid to the employee); Beutler v. WCAB, 550 A.2d 854 (Pa. Commw. Ct. 1988) (insurer was allowed to bring subrogation claim on decedent's estate after the estate received a wrongful death settlement from the school district).

52. Houston Indep. School Dist. v. Harrison, 744 S.W.2d 298 (Tex. Ct. App. 1987).

53. North Clackamas School Dist. v. White, 752 P.2d 1210 (Or. Ct. App. 1988). *See* DeSylvia v. Multnomah City School Dist., 755 P.2d 147 (Or. Ct. App. 1988) (insurer at the time a claimant originally injured his elbow was responsible for the condition that developed sixteen years later).

That decision was upheld on appeal.[54] The court held that the school district's dispute of the claim was not arbitrary and capricious since evidence existed to support both sides of the dispute.

A Pennsylvania head of custodians petitioned for review of the decision by the Workmen's Compensation Appeal Board to dismiss his claim of occupational disease. The court upheld that decision, finding no evidence of exposure to coal dust after the occupational disease provisions went into effect in 1973.[55] The claimant had worked as a coal miner prior to his employment by the school district, and had been regularly exposed to coal dust in years prior to 1973.

Two Pennsylvania physical education teachers became involved in a tugging match over a typewriter. After one teacher was knocked off balance and into a plate glass wall, she filed suit for injuries against the other teacher and school district. In affirming the trial court's decision for the worker, the appeals court held that injuries sustained by a worker engaged in conduct normally not expected in the workplace did not bar remedy by the Workers Compensation Act.[56]

A Michigan court of appeals reversed the Workers' Compensation Appeal Board, and remanded the case for further fact-finding in an instance involving a mechanic who had been injured while working for a school district.[57] The court held that the worker's failure to even attempt to perform work which he was known to be capable of performing, did not preclude him from receiving compensation benefits if he was disabled on a psychological basis.

A Colorado jury awarded a former school custodian damages for mental suffering and mental suffering caused by breach of contract. The school district was unsuccessful in its appeal of the award.[58] The court addressed the two areas of alleged mental suffering. The damages for mental suffering which arose from the direct consequence of the school district's breach of contract were not found to be barred by the Governmental Immunity Act. The damages were not seen to lie in tort, but arose as a direct consequence of the district's breach of contract. For the outrageous conduct by the defendants during the course of the custodians employment, the Workers' Compensation Act was found to be the proper remedy.

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54. Savoy v. Cameron Parish School Bd., 524 So. 2d 820 (La. Ct. App. 1988). *See* Grimes v. Leon County School Bd., 518 So. 2d 327 (Fla. Dist. Ct. App. 1987) (worker wearing leg brace as a result of polio was entitled to compensation for injuries incurred when the brace gave way at work).

55. Sulyma v. WCAB, 545 A.2d 485 (Pa. Commw. Ct. 1988). *See* Babin v. LaFayette Parish School Bd., 534 So. 2d 124 (La. Ct. App. 1988) (workers' compensation benefits stopped when medical evidence indicated no further disability).

56. Ruparcich v. Borgman, 547 A.2d 1279 (Pa. Commw. Ct. 1988).

57. Parmeter v. Grand Rapids Pub. Schools, 424 N.W.2d 6 (Mich. Ct. App. 1988).

58. Hoffsetz v. Jefferson County School Dist. No. R-1, 757 P.2d 155 (Colo. 1988).

An Ohio school janitor appealed a trial court order denying her compensation for psychological injuries.[59] The court of appeals held that the injury, allegedly caused by verbal and psychological harassment by the school principal, was mental and not physical in nature. Such injury, the court explained, is not compensable under Ohio statutes.

DEFAMATION

Prior to his election, a South Carolina school board candidate had business dealings with the school district. Such activities were prohibited for board members, but not for candidates. After his election, the board member brought a libel action against a newspaper which had erroneously reported that his prior business dealings with the district were illegal. The court dismissed the action citing the failure to show that the newspaper acted with actual malice.[60] Failure to investigate does not in itself establish bad faith. There was not sufficient evidence that the newspaper knew the article was false or entertained serious doubts about its truthfulness.

A Connecticut superintendent of schools brought an action for libel against a newspaper which published an editorial following his appearance on a radio show. The newspaper made statements concerning the superintendent's views on pupils with AIDS, and his alleged efforts to block the reporting of public correspondence with the school district. The court held that the positions taken in the editorial were pure opinion and involved matters of public concern; accordingly, the statements were constitutionally protected.[61]

A libel action against a New York social worker and school district was brought by the step-grandfather of a fourteen-year-old girl for the dissemination of a report alleging his sexual abuse of the girl. The action sought damages for the publication of the report to the county Child Protective Services and the school's Committee on the Handicapped. The trial court's denial of a motion for dismissal was appealed by the district and the social worker.[62] In reversing that decision, the court explained that the complete absence of malice on the part of the defendants entitled them to qualified immunity from civil liability. Although the report was found to be false, communication of such information, in good faith, to authorized recipients, was found to warrant such protection.

Also in New York, a former teacher brought an action claiming

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59. Wolf v. Northmont City Schools, 528 N.E.2d 589 (Ohio Ct. App. 1988).
60. Peeler v. Spartenburg Herald-Journal, 681 F. Supp. 1144 (D.S.C. 1988).
61. Dow v. New Haven Indep. Inc., 549 A.2d 683 (Conn. 1987).
62. Dunajewski v. Bellmore-Merrick Cent. High School Dist., 526 N.Y.S.2d 139 (App. Div. 1988).

denial of his civil rights based on the presence of allegedly false and defamatory charges in his personnel file. After the district court granted summary judgment for the school board, the plaintiff successfully appealed.[63] The court of appeals held that, although the stigmatizing charges had not been disclosed, the teacher could prevail if he could show the likelihood of future disclosure. When the teacher was unable to make that showing to the district court, he again appealed. This time the court of appeals upheld the lower court decision agreeing that there no longer existed a likelihood that the allegations would ever be made public. Prior to the second appeal, the superintendent had directed that the allegations be deleted from the personnel file, and ordered his subordinates not to reveal to prospective employers the allegations which led to the teacher's termination.

A Pennsylvania substitute teacher brought a defamation action against the school district and its business manager. The teacher had twice applied for unemployment benefits over the objection of the district. The district's defense in both instances was that the teacher had not been available for work when called. The defamation claim was based on a letter from the business manager terminating the services of the teacher and attributing the action to misconduct. The trial court's decision for the district was upheld by the appeals court.[64] The court agreed that the term "misconduct" could be considered defamatory when considered in the abstract, but in this instance was mere opinion. As such, the court explained, it would only be actionable if it implied the allegation of undisclosed defamatory facts as the basis for the opinion.

A Missouri sex education teacher brought a libel and slander action against a guest on a call-in radio show. The defendant had asserted that the teacher probably derived a type of sexual gratification from providing titillating information to students. On appeal, the trial court's decision for the defendant was upheld.[65] The statement was seen as a matter of opinion, and thus could not form the basis for an award for damages for either an intentional infliction of emotional distress or an invasion of privacy.

A former Pennsylvania vice-principal brought a defamation suit against the principal, superintendent, school board, and individual members of the school board based on the principal's evaluation and the vice-principal's subsequent discharge. In the evaluation and at a subse-

63. Brandt v. Board of Coop. Educ. Servs., 845 F.2d 416 (2d Cir. 1988).

64. Goralski v. Pizzimenti, 540 A.2d 595 (Pa. Commw. Ct. 1988).

65. Deupree v. Iliff, 860 F.2d 300 (8th Cir. 1988). *See* Mahoney v. Adirondack Publishing Co., 523 N.Y.S.2d 480 (App. Div. 1987). The decision in this libel action brought by high school football coach was reversed. Although the newspaper article describing the coach's sideline behavior was found to be false and defamatory, actual malice was not established.

quent school board meeting the plaintiff had been characterized as inept, insubordinate, and inattentive. The trial court dismissed all of the actions upon a plea of immunity. On appeal, the court found the principal and superintendent immune from liability. However, statements made by one school board member were seen as likely to infer that he was privy to undisclosed facts concerning the plaintiff's performance. Therefore, the case was remanded for further proceedings.[66]

TORTIOUS INTERFERENCE WITH A CONTRACT

In Texas, a former teacher brought an action against her school district, superintendent, and principal alleging intentional interference with her teaching contract. She claimed that a demotion and failure by the principal to provide her with the document needed to take a teacher competency test, as well as other incidents, culminated in her submitting her resignation. The district court granted summary judgment to the defendants and the teacher appealed.[67] The appellate court reversed that decision finding that the defendant's actions had interfered with the teacher's contractual rights. The essential elements of the cause of action were that: (1) there was a contract subject to interference, (2) the interference was willful and intentional, (3) the intentional act was the proximate cause of the teacher's damage, and (4) actual damage or loss occurred.[68] The court disagreed with the defendants that the teacher had failed to exhaust administrative remedies or that they were protected by good faith immunity.

An antitrust suit was brought against a West Virginia high school principal and the county board of education by a photographer. He claimed that conspiratorial actions had been taken to interfere with his business. At trial, an award was made representing actual damages as a result of actions taken by the principal to prevent students from having their yearbook pictures taken by the photographer. Because West Virginia law provides for triple damages in antitrust suits, the court entered a judgment for that amount. On appeal, the court found that the plaintiff failed to prove a conspiracy in restraint of trade.[69] Specifically, the actions by the principal against the photographer did not meet the test of being a concerted action between two or more distinct economic entities.

A successful applicant for a Delaware principalship brought suit alleging breach of contract against the school district and school board members. There was a refusal to honor the contract following discussion of unfavorable information concerning the appointee. The district court

66. Malia v. Monchak, 543 A.2d 184 (Pa. Commw. Ct. 1988).
67. Stimpson v. Plano Indep. School Dist., 743 S.W.2d 944 (Tex. Ct. App. 1987).
68. *Id.* at 945.
69. Gray v. Marshall County Bd. of Educ., 367 S.E.2d 751 (W. Va. 1988).

denied the board's motion for summary judgment. The plaintiff was found to have a protected property interest in his employment which entitled him to notice and the opportunity to be heard prior to termination.[70]

PRODUCTS LIABILITY

Thirty-four Illinois public school districts were required by the Asbestos Abatement Act to replace all asbestos-containing products in their buildings. For this, they were entitled to some reimbursement from the state. Naming seventy-eight defendants which either mined, manufactured, installed, or sold the product, the districts sought full reimbursement and other damages. The trial court granted the suppliers motion to dismiss the case and the school districts appealed. The court of appeals reversed the decision and remanded the case for trial.[71] The districts were found to have sufficiently established physical injury, stated a cause of action in restitution, proved fraudulent and negligent misrepresentation, and maintained a breach of warranty claim.

A Pennsylvania school district filed a motion to reopen a judgment against asbestos manufacturers after federal and state authorities found asbestos in its buildings.[72] The court denied the motion explaining that the school district could not bring suit based on newly discovered asbestos following an earlier incomplete investigation. The district's failure to discover identifiable asbestos in its earlier suit was seen as due to its own lack of diligence.

Asbestos exposure also was at issue in a Missouri case where a school district attempted to recover the costs of removing asbestos-contaminated ceiling tiles from seven school buildings. In addition, the district sought punitive damages on the theory that the manufacturer knew of the defect and danger associated with the tiles and, in selling them, showed a complete indifference for the safety of others. The trial court allowed the jury award for actual damages, but not those considered punitive. That decision was upheld on appeal.[73] The punitive damage claim in a strict liability case is based on the fact that the defendant should have known of the dangerous defect in its product. After discovery of the potential danger related to the school ceilings, the district

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70. Kirschling v. Lake Forest School Dist., 687 F. Supp. 927 (D. Del. 1988).

71. Board of Educ. v. A, C, and S, Inc., 525 N.E. 2d 950 (Ill. App. Ct. 1988). *See* Hebron Pub. School Dist. No. 13 v. United States Gypsum, 690 F. Supp. 866 (D. N.D. 1988) (school district's claim against asbestos manufacturer was upheld even though the district removed the asbestos rather than request the manufacturer do so).

72. Catasauqua Area School Dist. v. Eagle-Picher Indus., 118 F.R.D. 566 (Pa. 1988).

73. School Dist. of Independence v. United States Gypsum, 750 S.W.2d 699 (Mo. Ct. App. 1988).

used a heavy paint on the tiles for the purpose of encapsulation of asbestos fibers. However, this allowed a heavier than normal water backup behind the painted surfaces which made leaks more serious than had been previously experienced. Ultimately, the school board voted to remove the asbestos-containing material. The appeals court found no evidence that the asbestos manufacturer knew at a relevant time that water damage to the ceiling tiles would release asbestos into the air.

In the only 1988 products liability case not related to asbestos, it was deemed a matter for the jury as to whether a manufacturer had the duty to warn of the possibility of eyeglasses shattering while a student played volleyball in gym class.[74]

Construction Contracts

A Louisiana appeals court affirmed a decision that a school board had to pay the balance due on construction of a school.[75] The decision was amended significantly, lowering the amount due. The contractor claimed that he should be excused for twenty of the days the construction was delayed, and for which he was penalized. The court disagreed, finding that rain and cold during one month of a thirteen-month contract period did not justify the delay in performance.

A Wyoming plumbing and heating contractor alleged that his rejection as a subcontractor on a school construction project deprived him of a constitutionally protected property interest. The appeals court upheld the trial court decision denying this claim.[76] Wyoming law did not recognize a protected property interest in relation to a right to bid on public projects. Correspondence from the school district to the contractor may have fostered an expectancy that a bid would be considered, but did not provide a legitimate claim of entitlement to any such consideration.

Constitutional Torts

During a Connecticut school board meeting, a debate ensued among members of the board concerning the acting chairman's right to serve out the remainder of the outgoing chairman's term. After the debate had continued for some time, a member of the audience rose and made comments critical of the positions taken by one faction of the board. A shouting match developed between the speaker and one of the board

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74. Boudreau v. Jack Eckerd Corp., 854 F.2d 85 (5th Cir. 1988).

75. S.J. Lemoine v. St. Landry Parish School Bd., 527 So. 2d 1150 (La. Ct. App. 1988).

76. Teton Plumbing & Heating v. Laramie County School Dist., 673 P.2d 843 (Wyo. 1988). *See* Rice v. Scott County School Dist., 526 N.E. 2d 1173 (Ind. Ct. App. 1988) (there is no constitutionally protected property interest in a government contract sought by a disappointed bidder).

members who ordered the audience member to be quiet. Ultimately, the police were summoned to remove the speaker. The board member claimed qualified immunity in seeking reversal of the district court's decision that his actions violated the speaker's first amendment guarantee to freedom of speech. Under the doctrine of qualified immunity, a government official is protected from personal liability to the extent that the discretionary functions he performs do not violate clearly established statutory or constitutional rights. The court of appeals upheld the district court in determining that the board member was not shielded from liability.[77] As a general rule, state action that regulates speech on the basis of its content is prohibited by the first amendment. The actions taken at the school board meeting were clearly seen to have constituted state action. Even though the government may subject speech to valid time, place, and manner restrictions, such regulation is particularly restricted when the speech occurs in a place where public speech is usually allowed.

Georgia peace activists were granted the right to participate in a high school career day in a previous decision.[78] At that time, the court deferred the question of whether the activists could discuss the merits of military service. Upon remand, the court held that regulations prohibiting participants in "Career Day" or "Youth Motivation Day" programs from criticizing opportunities offered by others violated the first amendment.[79] Additionally, since content-based restrictions were not found to serve a compelling state interest, they cannot limit activist's access to guidance offices and bulletin boards.

A Tennessee parent objected to the reading series adopted by the board of education and used by her child's school. Objection was made to alleged endorsement of secular humanism, evolution, and non-Christian beliefs by the series. For a time, the parent took her child out of class during the period alloted for reading instruction, and taught her daughter in the school library. She made use of books from an older reading series with which she had no objection. When the board of education passed a resolution requiring all students to use the approved books, the mother was told her daily practice of taking her daughter from reading class violated board policy. Additionally, she would no longer be allowed to use the school's facilities to teach her daughter. Rather than discontinue

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77. Musso v. Hourigan, 836 F.2d 736 (2d Cir. 1988). *See* Piver v. Pender County Bd. of Educ., 835 F.2d 1076 (4th Cir. 1987) (teacher's speech supporting tenure for his principal was found related to a matter of public concern and therefore protected by the first amendment); Zuber v. Bordier, 522 N.Y.S.2d 610 (App. Div. 1987) (parent's statements concerning a teacher's competence were constitutionally protected expressions of opinion not supporting the teacher's action for the intentional infliction of emotional distress).

78. Searcey v. Crim, 815 F.2d 1389 (11th Cir. 1987).

79. Searcey v. Crim, 681 F. Supp. 821 (N.D. Ga. 1988).

the lessons, the mother took the child to the school parking lot for the instruction. Following the refusal to stop the practice and leave the school grounds, the parent was arrested and spent about three hours in jail. Almost a year later, after having removed her daughter from the school, the parent filed suit. The mother alleged that her expression of ideas was restrained, that she was denied the custody of her daughter without due process, that her right to speak symbolically was suppressed, and that she was falsely arrested, prosecuted, and imprisoned. Essentially, her claim was a denial of her first and fourteenth amendment rights. Following a jury trial in which damages were awarded to the mother, the school district appealed.[80] The court failed to agree that there had been a deprivation of the mother's constitutional rights. There was no evidence that she had been prevented from expressing her views at school board meetings. She had been given notice that she would no longer be permitted to remove her daughter from the regular reading class. Despite this knowledge, she chose to send her daughter back to the school and to continue her disruption of the school's normal routine.

Student Initiated Cases

A decision to discipline a student, which results in the use of excessive force causing appreciable physical pain, can constitute an invasion of the student's fifth amendment liberty interest in his personal security. Such action could also constitute a violation of substantive due process prohibited by the fourteenth amendment. Parents of a Pennsylvania student alleged that acts of their son's teacher were of such a nature. During a swimming class, the teacher overheard the student using inappropriate language. He walked behind him and placed his arms around the student's neck and shoulders. While holding and lifting the student, the teacher questioned him regarding the use of language. When he released him, the student fell face down on the pool deck suffering injuries requiring hospitalization. The trial court found for the school district, and the parents appealed. In reversing that decision and remanding the case, the court of appeals held that it was a matter for a jury whether the actions taken by the teacher exceeded the degree of force needed to correct the breach of discipline.[81]

Two Arkansas students brought an action against their school district claiming violation of their constitutional rights to due process as a result of punishments administered while they were in school.[82] The first

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80. Frost v. Hawkins County Bd. of Educ., 851 F.2d 822 (6th Cir. 1988).

81. Metzger v. Osbeck, 841 F.2d 518 (3d Cir. 1988).

82. Wise v. Pea Ridge School Dist., 855 F.2d 560 (8th Cir. 1988). *See* State v. Brooks, 741 S.W.2d 920 (Tenn. 1987) (statute prohibiting carrying a weapon on school grounds was not found to be overbroad in violation of due process).

student had participated in an impermissible and dangerous game during physical education class. He received corporal punishment in the form of "two licks" on the buttocks with a wooden paddle. The second student was placed in in-school suspension for three days as a result of unexcused lateness to school on seven occasions. In both instances, the district court decision for the school district was upheld. The punishments were not found to have violated the students' due process rights, or to be excessive. Rather, they fell within common law privilege.

Regarding the corporal punishment, the court explained that it would be a deprivation of substantive due process only if it had been arbitrary, capricious, or wholly unrelated to the school's goal of maintaining an appropriate learning environment. Likewise, the in-school suspension was not found to be a due process violation. Both the student and his mother were aware of the consequences of unexcused tardiness, and neither had attempted to explain them.

Two Mississippi students alleged that their constitutional rights to equal protection of law and procedural due process were violated when they were suspended for misconduct.[83] On the due process claim, the district court denied school officials a summary judgment on the claim of one student. It remained to be determined whether the suspension, which included three days out of school and seven days in-school, would require the more formal procedures required for long-term suspensions. The claim by the other student was denied as she admitted the improper conduct thus obviating the need for a due process hearing. On the equal protection claim, once again the court denied summary judgment on the claim of the first student. It had yet to be determined whether nonathletes, such as the student in question, were punished while athletes committing similar infractions were not. The claim by the second student was denied with the court noting that merely because some offenders escape punishment does not deny equal protection to those punished. Both students claimed that when their arms were grabbed their rights under the fourth and eighth amendments were violated. The court held that these actions, in one case to stop the student from entering a classroom, and in the other to force the student to pay attention, were without malice, related to maintaining school discipline, and not physical abuse of constitutional proportions.

A civil rights action alleging the physical and sexual assault of handicapped students was brought against a Missouri special school bus driver, the school district, and district officials.[84] The court held for the district and its officials in both their individual and official capacities.

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83. Cole v. Newton Special Mun. Separate School Dist., 676 F. Supp. 749 (S.D. Miss. 1987).

84. Jane Doe v. Special School Dist., 682 F. Supp. 451 (E.D. Mo. 1988).

The plaintiffs had not shown a failure to adequately supervise or train subordinates. To do so a plaintiff must show that (1) the official received "notice of a pattern of unconstitutional acts" committed by subordinates; (2) the official "demonstrated deliberate indifference [to] or tacit authorization of the offensive acts;" (3) the official failed to take sufficient "remedial" action; and (4) the official's failure proximately caused injury to the plaintiff. However, allegations made on behalf of the abused students and students who witnessed the abuse were found sufficient to state a claim of action against the driver for violation of the students due process rights.

An Ohio high school student was expelled for the remainder of a semester following his alleged possession and attempt to sell a marijuana cigarette. His assertion of a denial of his due process rights was not recognized by the district court. The Sixth Circuit Court of Appeals reversed that decision on the basis that the student was not given the chance to rebut evidence disclosed to the board of education.[85] Specifically, evidence presented by a guidance counselor during the closed portion of the school board meeting amounted to a clear deprivation of the student's right to procedural due process of law.

A New York Orthodox Jewish student brought suit against the board of education to enjoin the scheduling of graduation exercises on Saturday. Such scheduling, the student claimed, would violate his first amendment right to freely exercise his religion. The board of education appealed the district court decision enjoining the scheduling of the exercises.[86] In reversing that decision, the court of appeals explained that in a pluralistic society it is impossible for government to accommodate every need of every religious group. The court concluded that attending the graduation exercises was not a prerequisite to the student receiving his diploma. The exercises were not seen as an important benefit conferred by the state and therefore attending them was not protected by the free exercise clause of the first amendment.

Comparing a student's right to be free from sexual abuse with the established right to be free from physical abuse, the Third Circuit Court of Appeals upheld a district court decision denying summary judgment to a Pennsylvania school district.[87] A female member of a high school band brought the action for injuries arising from sexual assaults by the band's director. In remanding the case for further action, the court explained that immunity under state law does not detract from the existence of a common law duty, or potential liability under section

85. Newsome v. Batavia Local School Dist., 842 F.2d 920 (6th Cir. 1988).

86. Smith v. North Babylon Union Free School Dist., 844 F.2d 90 (2d Cir. 1988).

87. Stoneking v. Bradford Area School Dist., 856 F.2d 594 (3d Cir. 1988). *See* Sowers v. Bradford Area School Dist. (where another student successfully raised constitutional issues stemming from sexual abuse by the band director).

1983. Based upon the reports of incidents of sexual misconduct by the band director, it was determined that the school officials knew, or should have known, that female band members faced a special danger. The court held that these circumstances placed a constitutional duty upon the officials to investigate and take reasonable steps to protect the students.

The constitutionality of a Texas statute allowing corporal punishment was examined in a case involving the paddling of two elementary schoolgirls. Each girl was given two swats by the principal for "snickering" in the hall. Shortly afterward, the girls each received three additional swats from their teacher for "snickering" in class. Social workers who examined the plaintiff's bruises stated that the situation constituted child abuse. The civil rights action against the principal, superintendent, and teacher sought monetary damages for the infliction of injuries. The action was dismissed by the trial court, and appeal was sought.[88] In upholding the dismissal, the court noted that Texas provides common law remedies which serve to deter unjustified or excessive punishment and redress that which may occur. Citing that history is filled with examples of mistreatment, the plaintiffs argued that children are a group at risk. The court failed to recognize that contention, explaining that the type of intermediate scrutiny sought has only been applied previously to classifications based on gender, legitimacy, or alienage. Thus, the court applied a rational-basis review of the Texas law. Under such a review, the court presumes state legislation to be constitutionally valid. The Texas law was found to be reasonable in the light of its purpose, and bore a rational relationship to the objective of maintenance of discipline and order in public schools.

Employee Initiated Cases

A civil rights action against the school committee was brought by a Massachusetts principal. Following several incidents of alleged poor judgment, the principal was required to submit to a psychiatric examination and was later demoted when his school was closed. The action alleged a denial of the principal's rights to privacy and liberty as guaranteed by the fourth and fourteenth amendments. The court of appeals upheld the trial court's contention that, in ordering the examination, the committee was merely seeking to insure that if the principal returned to work he would not jeopardize the school system's interest in providing a safe and healthy educational environment.[89]

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88. Cunningham v. Beavers, 858 F.2d 269 (5th Cir. 1988).

89. Daury v. Smith, 842 F.2d 9 (1st Cir. 1988). For a discussion of civil rights claims derived from the firing of local school officials see Courtemanche v. Enlarged City School Dist., 686 F. Supp. 1025 (S.D.N.Y. 1988).

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SPORTS

Linda A. Sharp

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INTRODUCTION

This Chapter includes all cases, at either the K-12 or higher education levels, which deal with student-athletes, coaches, athletic directors, athletic associations, and booster organizations. It also includes all cases, at those levels, which involve sports programs and events and/or sports facilities and equipment. However, no case law is discussed which pertains to physical education instruction or intramural participation.

ELIGIBILITY

This section contains ten cases: three involved students who were ineligible to participate because of misconduct; two were ruled ineligible because of academic difficulties; one questioned the eight-semester rule; one petitioned for an additional year of eligibility; two students found transfer rules objectionable; and one case dealt with the issue of drug testing as a prerequisite to athletic participation.

Discipline

In a case out of Kentucky, high school members of the baseball team violated school rules by drinking alcohol at a school sponsored event. The students were given five-day suspensions from school and extracurricular activities. The students sought a preliminary injunction from the district court on the basis that there was an infringement of their substantive due process rights. The court denied the injunction on the basis that the length of the suspension was not unreasonable in view of the infraction in question.[1]

A federal district court in New Jersey heard the case of a high school football player who was suspended from participating in extracurricular activities for sixty days. His admitted offense was smoking marijuana and drinking beer on school property. After hearing arguments in which the student claimed an infringement of his property interest in playing football, the court granted summary judgment for the school district. Under New Jersey law, there is no constitutionally protected property interest in extracurricular activities.[2]

1. Katchak v. Glasgow Indep. School Sys., 690 F. Supp. 580 (W.D. Ky. 1988).
2. Palmer v. Merluzzi, 689 F. Supp. 400 (D.N.J. 1988).

In a federal district court in Kansas, a former high school head cheerleader sued after she was removed from her position. Although the student had informed the principal and superintendent that she would be absent for a period of time while she went to Nashville to record an album, the cheerleader sponsors nonetheless removed her from the squad. The suit was brought on two bases: (1) she alleged an infringement of her property interest in the head cheerleading position; and (2) she alleged a denial of first amendment rights since she was ostensibly removed after she exercised her right to free speech (i.e., her singing performance in Nashville). The court granted the school district's motion to dismiss. There is no constitutionally protected property interest in cheerleading and there was no evidence to suggest that her "free speech" rights led to her removal.[3]

Academic Issues

A Louisiana Court of Appeals reviewed a case in which a high school student was barred from trying out for the cheerleading squad because of her inability to meet the requisite 1.6 grade point average. The lower court granted a permanent injunction allowing the student to participate. The court of appeals reversed on the basis that there was no violation of equal protection even though the required grade point average for team sports was only 1.5. The court found that the rule was rationally related to the promotion of academic excellence.[4]

In a Kansas case, a high school football player challenged the constitutionality of a "no make-up" rule which prohibited students from making up failed classes after the semester in order to regain academic eligibility. The Kansas Court of Appeals reversed the lower court which had granted an injunction to the player. The right to participate in extracurricular activities is not a fundamental right and the rule met the rational basis test. It encourages students to study and is not overly harsh in that students can enroll in six or seven classes a semester and need only pass five to participate.[5]

The Eight Semester Rule

A student, solely for academic reasons, repeated the eleventh grade. The student was then prevented from participating in athletics by the California Interscholastic Federation rule which placed an eight semester limitation on athletic eligibility. The Court of Appeals of California found that this rule was rationally related to averting situations where

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3. Haverkamp v. Unified School Dist. No. 380, 689 F. Supp. 1055 (D. Kan. 1988).
4. Rousselle v. Plaquemines Parish School Bd., 527 So. 2d 376 (La. Ct. App. 1988).
5. Stone v. Kansas State High School Activities Ass'n, Inc., 761 P.2d 1255 (Kan. Ct. App. 1988).

teams of more veteran athletes would gain an unfair competitive advantage over schools whose athletes progressed normally through the system. Thus, the court of appeals reversed the superior court which had granted a preliminary injunction for the student.[6]

Limitation on Years of Eligibility

In a case out of Arizona, a student challenged the state interscholastic association's rule which denied the student an additional year of eligibility. The student believed that he should fall within that part of the rule which allows an additional year of eligibility for "illness." In this situation, however, the student's "illness" related to incarceration in a juvenile institution after he committed burglary to get money to support his drug addiction. The Arizona Court of Appeals found that just as addiction does not excuse criminal acts neither does it make incarceration an absence due to "illness" within this situation. Thus, the injunction granted by the lower court was vacated.[7]

Transfer

In an Indiana case, a student transferred from a small private high school to a larger parochial school. The transfer was made to broaden the student's horizons and she did not transfer for reasons relating to her participation in interscholastic volleyball. Nonetheless, she was automatically prevented as a transfer student from participating in interscholastic athletics for one year after her transfer. The student sought an injunction from the federal district court under section 1983. After an extensive analysis of the law as it pertains to "state action," the district court found that the conduct of the IHSAA was not state action.[8] The court looked at the precedent from the United States Supreme Court in *Rendell-Baker v. Kohn*[9] and *Blum v. Yaretsky*[10] as well as a Fourth Circuit Court of Appeals case which dealt specifically with the issue of the NCAA and state action.[11] In particular, the district court found the reasoning of this last case "equally applicable to high school athletics and the IHSAA."[12]

A no transfer policy which was in force to balance enrollments between two high schools was challenged by a student who was pre-

6. California Interscholastic Fed'n v. Jones, 243 Cal. Rptr. 271 (Ct. App. 1988).
7. Clay v. Arizona Interscholastic Ass'n, Inc., 757 P.2d 1059 (Ariz. Ct. App. 1988).
8. Anderson v. Indiana High School Athletic Ass'n, 699 F. Supp. 719 (S.D. Ind. 1988).
9. Rendell-Baker v. Kohn, 457 U.S. 830 (1982).
10. Blum v. Yaretsky, 457 U.S. 991 (1982).
11. Arlosoroff v. NCAA, 746 F.2d 1019 (4th Cir. 1984).
12. Anderson v. Indiana High School Athletic Ass'n, 699 F. Supp. 719, 726 (S.D. Ind. 1988).

vented by the policy from attending the high school of her choice which had the swim team and coach under whom she wished to train. The rule was put into place to prevent an imbalance in enrollment which would interfere with the school district's ability to offer equal educational opportunities at each school. Additionally, if one of the school's enrollment dropped below a certain number, that school would lose its status as a Class A school for athletic competition. The Michigan Court of Appeals found that there was a rational basis for this no transfer policy and affirmed the lower court's judgment for the school district.[13]

Drug Testing

In this case out of Indiana, a drug testing program to be applied to all students who wished to participate in interscholastic athletics was found not to violate the constitutional rights of the student-athletes. Eligibility to participate in varsity athletics was conditioned upon the student-athlete's consent to random urinalysis drug testing. The federal district court denied the request for an injunction to prohibit the application of this system.

Although the court did consider the drug testing to be a search within the meaning of the fourth amendment, it also considered the testing to be "reasonable." The school's interest in maintaining a drug-free athletic program for the health and safety of participants is an important governmental interest which is furthered by drug testing. The school authorities were within their discretion in singling out athletes for the drug testing program since they have a unique standing in the school and participation in school athletics is a privilege, not a constitutionally protected right.[14] The Seventh Circuit Court of Appeals affirmed the district court's decision.[15]

Equality of Programs

General

A class of women student-athletes brought suit against Temple University for alleged sex discrimination in the administration of its athletic programs. The federal district court denied the university's motion for summary judgment. First, there was a material issue of fact as to whether the evidence that only one-third of the participants in intercollegiate athletic programs were women indicated gender discrimination. Second,

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13. Palmer v. Bloomfield Hills Bd. of Educ., 417 N.W.2d 505 (Mich. Ct. App. 1987).
14. Schaill v. Tippecanoe County School Corp., 679 F. Supp. 833 (N.D. Ind. 1988).
15. Schaill v. Tippecanoe County School Corp., 864 F.2d 1309 (7th Cir. 1988).

based on its interpretation of the *Grove City College v. Bell* decision,[16] this court held that athletic scholarships are a part of a university's financial aid program thus bringing the intercollegiate athletic program within the ambit of title IX.[17]

In a case from Montana, female athletes complained of sex discrimination in secondary school programs. The case was dismissed pursuant to a settlement agreement which was arrived at with the assistance of a facilitator. However, the federal district court retained continuing jurisdiction to enforce the agreement. Thereafter, the plaintiffs alleged that the agreement was violated since the high school association did not take action to align the girls' basketball and volleyball seasons with the national norm. The court found for the defendants.[18] The Ninth Circuit Court of Appeals affirmed this decision on the basis that the "law of the case" did not mandate the change of seasons.[19]

Girl to Play on Boys' Team

In a federal district court case from Nebraska, a female high school sophomore sought a restraining order to prevent the high school activities association from refusing her permission to wrestle on the high school boys' team. The district court granted her a temporary restraining order since the court failed to find a substantial relationship between the rule prohibiting females from the wrestling team and the asserted goal of protecting the health and safety of female students. In this case the rule operated on the assumption that females are innately inferior and no evidence was presented to show that this plaintiff was incapable of safely participating with male wrestlers.[20]

Boy to Play on Girls' Team

A male who wished to participate on the girls' interscholastic volleyball team obtained preliminary injunctive relief from a district court in Colorado allowing him to participate. However, the Tenth Circuit Court of Appeals reversed on the basis that the lower court had erroneously applied an overly stringent test for gender-based discrimination.[21]

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16. Grove City College v. Bell, 465 U.S. 555 (1982).

17. Haffer v. Temple Univ., 617 F. Supp. 517 (E.D. Pa. 1987). *See* The Yearbook of Education Law 1988 at 183, Haffer v. Temple Univ., 115 F.R.D. 506 (E.D. Pa. 1987).

18. *See* The Yearbook of School Law 1987 at 182, Ridgeway v. Montana High School Ass'n, 633 F. Supp. 1564 (D. Mont. 1986).

19. Ridgeway v. Montana High School Ass'n, 858 F.2d 579 (9th Cir. 1988).

20. Saint v. Nebraska School Activities Ass'n, 684 F. Supp. 626 (D. Neb. 1988).

21. Rowley v. Members of the Bd. of Educ. of St. Vrain Valley School Dist., 863 F.2d 39 (10th Cir. 1988).

Enforcement of Rules

Probation/Sanction

In a case out of Washington, a female track athlete filed suit against the University of Washington challenging the constitutionality of the drug testing plan. The Superior Court of Washington enjoined the drug testing. The university brought in the NCAA as a third party defendant and the NCAA removed the case to the federal district court. The district court ruled in favor of the NCAA.[22] The Ninth Circuit Court of Appeals has now addressed the issue of whether the case was properly removed to federal court. It ruled that the university's third party complaint against the NCAA was a matter of state law. Furthermore, the NCAA cannot assert diversity of citizenship jurisdiction. Therefore, the matter has been remanded to the district court with directions that this court remand the entire case back to the state court.[23]

In the wake of the "death penalty" against Southern Methodist University because of extensive NCAA violations, University alumni, football players, and cheerleaders brought suit against the NCAA for the violation of antitrust and civil rights laws. The plaintiffs alleged that the violations occurred in the enforcement of NCAA rules which limit the compensation which football players may receive to scholarship monies. The restriction on allowable compensation was, in the plaintiffs' view, price fixing in violation of the Sherman Act. The federal district court dismissed the complaint. The Fifth Circuit Court of Appeals found that the alumni and cheerleaders lacked standing to pursue the antitrust claim. Although the court held that the football players "may" have standing, they lost on the merits of the claim. The civil rights claims were disposed of on the basis that the NCAA was not a state actor.[24]

The plaintiffs in this case out of Kansas are a number of black football players who alleged that they were being treated in a racially discriminatory manner by the university coaching staff and administration. The players boycotted practices as a protest of their treatment and they were subsequently removed from the team. However, their athletic scholarships were not taken away from them. In their suit in a federal district court, the plaintiffs alleged that their freedom of speech rights were infringed upon and that their liberty and property rights were also violated. The court held that there was no infringement of their property rights since they did not lose their scholarships. There is no property interest in the right to play football, only in the right to receive scholarship funds. Thus, the defendant's

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22. *See* The Yearbook of Education Law 1988 at 185, O'Halloran v. University of Wash., 672 F. Supp. 1380 (W.D. Wash. 1987).
23. O'Halloran v. University of Wash., 856 F.2d 1375 (9th Cir. 1988).
24. McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1988).

motion for summary judgment was granted in regard to this issue. However, the court refused to grant summary judgment regarding the issue of the infringement of the players' free speech rights.[25]

Howard University sought a restraining order against the NCAA for denying it a postseason berth in the Division I-AA football tournament. The plaintiff alleged that the NCAA failed to follow its own guidelines in the selection of teams to postseason play and unfairly excluded the plaintiff university. Although the plaintiff demonstrated that it may prevail on the merits, a restraining order was not warranted because of the risk of substantial harm to other schools who were already at the sites of the postseason contests.[26]

TORT

In 1988 there were seventeen tort cases dealing with sport. Of these cases, four were intentional torts. One case dealt with reckless misconduct; two were defamation cases; and one case involved educational exploitation. Of the thirteen negligence cases, ten dealt with participants and three concerned spectators.

Intentional

Reckless Misconduct. The plaintiff sustained paralyzing injuries in a lacrosse game after he was flipped over the back of the defendant, an opposing player. The plaintiff grabbed the defendant from the back and held him in a bear hug after the defendant stood over one of the plaintiff's teammates taunting him. In response to the plaintiff's bear hug, the defendant threw the plaintiff over his back. An earlier Ohio Supreme Court decision dealt with issues of the agency relationship between the defendant and his University.[27] In this court of appeals decision, the issue was the duty owed by the defendant to the plaintiff in this situation. The court viewed the actions of the defendant to be reflexive and instinctive. As such there is no liability for actions between players which do not rise to the level of an intentional tort. In this court's view an intentional tort is defined as a "specific and perverse intent to cause physical injury to another separate and apart from the heat of the contest."[28]

Defamation. A high school football coach brought a libel action against a newspaper for reports of the coach's alleged behavior during and after a football game. The reports related to verbal abuse by the coach

25. Hysaw v. Washburn Univ. of Topeka, 690 F. Supp. 940 (D. Kan. 1987).
26. Howard Univ. v. NCAA, 675 F. Supp. 652 (D.D.C. 1987).
27. *See* The Yearbook of School Law 1987 at 186, Hanson v. Kynast, 494 N.E.2d 1091 (Ohio 1986).
28. Hanson v. Kynast, 526 N.E.2d 327 (Ohio Ct. App. 1987).

including profanity directed toward his quarterback. A trial court returned a verdict for the coach in both compensatory and punitive damages. The Supreme Court Appellate Division negated the award of punitive damages and upheld the compensatory damage award.[29] On appeal to the Court of Appeals of New York, the matter was reversed. The coach failed to carry his burden of establishing actual malice. A "misunderstanding" by the reporter of the content of the coach's comments to his quarterback is insufficient to establish actual malice.[30]

In a Minnesota case, a high school tennis coach sued a rival coach, a newspaper columnist, and a newspaper for libel. The defendant coach allegedly told the defendant columnist that the plaintiff had cheated in a tennis match by playing a team member in a position other than her ranked position, a violation of the tennis rules. On the day in question, plaintiff's number one ranked player was put in the number two slot. The lower court found for the defendants. The court of appeals affirmed this decision on the basis that the defendant's statement was true and thus could not be defamatory.[31]

Educational Exploitation. In a Michigan case, a complaint was brought against a city board of education and an Idaho junior college to recover for the alleged exploitation of a student's athletic talent in basketball in derogation of the defendants' duties to further the student's education. A high school student who was in special education classes for slow learners was allegedly transferred to regular classes so that the student could participate in basketball. He graduated from high school even though he was illiterate. He then attended an Idaho junior college where he was to be "academically carried" for two years before he would transfer to a four year school. While at the junior college, he suffered a complete nervous breakdown because he was subjected to ridicule by a number of students who discovered his illiteracy. The Michigan Court of Appeals found that the Idaho junior college was not subject to jurisdiction in Michigan. Furthermore, the school board had governmental immunity since high school sports are a part of the secondary education process which is a governmental function.[32]

Negligence

Participants. The mother of a football player who became ill at practice and later died brought suit under section 1983 and the state wrongful death statute. A federal district court in Mississippi held that

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29. *See* The Yearbook of School Law 1987 at 184, Mahoney v. Adirondack Publishing Co., 509 N.Y.S.2d 193 (App. Div. 1986).
30. Mahoney v. Adirondack Publishing Co., 523 N.Y.S.2d 480 (N.Y. 1987).
31. Poncin v. Arlt, 428 N.W.2d 485 (Minn. Ct. App. 1988).
32. Jones v. Williams, 431 N.W.2d 419 (Mich. Ct. App. 1988).

the eleventh amendment barred an action against the Board of Trustees and that the individual board members had qualified immunity.[33] Thereafter the suit proceeded against the coach, team physician, and trainer. Although the district court held that the plaintiff had stated a claim against these individuals, the Fifth Circuit Court of Appeals reversed.[34] Under Mississippi law, the trainer and team physician were entitled to qualified immunity because they were performing discretionary functions in administering medical treatment. The extension of "discretionary functions" to encompass medical care was done as a policy matter. Additionally, the coach had qualified immunity in this case because he was being sued merely due to his general authority over the program.

In a New York case, a high school football player sustained injury allegedly because he was playing in a mismatched game in a fatigued condition. The team on which the injured student participated had a very poor record. The principal of the school had requested that his team be assigned to a less competitive division because it was clear that his football team was outmatched. However, the league supervisor denied the request. On the day of the injury, the student's team was playing a vastly superior team. The principal and the coach had discussed not playing this game because it had a high risk of injury. However, the game was played, and the student, who had played virtually every down because of a lack of qualified replacements, was injured near the end of the first half. The student prevailed at the state supreme court level. Upon appeal, the lower court decision was affirmed. The school unreasonably enhanced the risk of injury to the student by playing this contest which clearly had a high risk of injury.[35]

At a high school track meet in Pennsylvania, a pole vaulter failed to clear the bar and landed with one foot on the landing mat and one foot off, thus sustaining injury. The student alleged negligence in the failure of the school to conform to applicable guidelines regarding the placement of the landing mat and cushions. The lower court granted summary judgment on the basis of governmental immunity. The appellate court reversed on the basis that there is an issue of fact regarding whether the pole vault unit may be considered permanently fixed to the property (i.e., whether the real property exception to immunity may be applicable).[36]

In a Louisiana case, a volunteer assistant softball coach for a grade school team was injured as he jumped over a chain link fence to retrieve

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33. *See* The Yearbook of Education Law 1988 at 187, Sorey v. Kellett, 673 F. Supp. 817 (S.D. Miss. 1987).

34. Sorey v. Kellett, 849 F.2d 960 (5th Cir. 1988).

35. Benitez v. New York City Bd. of Educ., 530 N.Y.S.2d 825 (App. Div. 1988).

36. Cestari v. School Dist. of Cheltenham Township, 520 A.2d 110 (Pa. Commw. Ct. 1987).

a ball. The court of appeals found no liability for the school district. There was no defect in the fence and the coach simply slipped on the wet grass. Additionally, the coach could have chosen a safer, more easily accessible, alternative route instead of jumping the fence.[37]

A bicyclist in New York hit his head on a cross beam which ran under the press box at a state university's stadium. Although the court of claims found some fault by the defendant, the appellate court reversed. The beam was readily observable by the reasonable use of one's senses.[38]

The next three cases deal with injuries sustained in lockerrooms. In the first case, a high school student was involved in an altercation with another student. The students were in the lockerroom for a school sponsored athletic event. The plaintiff was allegedly provoked by the other student into chasing him. The other student then closed a door upon the plaintiff's hand resulting in the traumatic amputation of the plaintiff's little finger. The failure to supervise in this situation was not actionable under Illinois law because the standard of care is breached only by willful and wanton misconduct. The allegation that other altercations had arisen between students in the past was insufficient to show willful and wanton misconduct.[39]

In a California case, a high school wrestler who was changing clothes in an unsupervised restroom before practice was assaulted by a nonstudent. The California Court of Appeals held that the complaint did state a cause of action against the school district. The plaintiff alleged that the school district failed in its duty of supervision in that the school district was aware or should have been aware that the restroom was unsafe and attacks by nonstudents were likely to occur.[40]

In a rather peculiar case out of Indiana, a female member of a school's swim team was injured in the girls' lockerroom as she was changing her clothes. She was injured as a member of the boys' wrestling team, while engaged in an act of voyeurism, fell through a false ceiling and landed upon the object of his inspection. The plaintiff alleged that the school breached its duty in supervising its students (i.e., that the school failed to supervise a student with a propensity to peep). Notwithstanding the above, the Indiana Court of Appeals did not reach the merits of this matter since plaintiff's claim was dismissed because of a failure to meet the notice requirements of the Indiana Tort Claims Act.[41]

A Kansas case dealt with the duty of a private high school to provide disability insurance for those who participate in interscholastic athletics.

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37. Springer v. St. Bernard Parish School Bd., 521 So. 2d 461 (La. Ct. App. 1988).
38. Poerio v. State, 534 N.Y.S.2d 459 (App. Div. 1988).
39. Holsapple v. Casey Community Unit School Dist. C-1, 510 N.E.2d 499 (Ill. App. Ct. 1987).
40. Leger v. Stockton Unified School Dist., 249 Cal. Rptr. 688 (Ct. App. 1988).
41. Rodgers v. Martinsville School Corp., 521 N.E.2d 1322 (Ind. Ct. App. 1988).

A high school football player was injured during a football game resulting in quadriplegia. The suit which was brought against the high school alleged negligence by the school in: (1) a failure to provide disability insurance for athletes; and (2) a failure to advise the student of the extent of insurance coverage provided. The Kansas Supreme Court held that there was no duty to insure based on the applicability of a Kansas statute which provides that boards of education "may" choose to purchase insurance but does not mandate that insurance be provided. Also, the failure to disclose the extent of insurance actually provided did not increase the risk of injury to plaintiff nor did he rely on the promise by the defendant of disability insurance when he chose to participate in football.[42]

The issue of the legality of public school districts requiring students and their parents to sign releases as a condition of student participation in athletics was addressed by the Washington Supreme Court. The documents in question had language to the effect that there was a release of "liability resulting from any ordinary negligence that may arise in connection with school district interscholastic activities programs." The court engaged in a six-part analysis regarding the obligations of a school district to its constituents before it arrived at the conclusion that the release was invalid as a violation of public policy. In part the court relied upon the fact that the school performs a service of great importance to the public and that the school district has a decisive advantage in terms of its bargaining power. It should be noted, however, that the court left open the issue of the effectiveness of language in the release forms which serves as a warning of inherent risks.[43]

Spectators. A ten-year-old spectator at a teeball game held on school property was injured as she tripped over a cable barrier which was suspended through a series of concrete posts. The child sustained a broken knee and torn ligaments. The Louisiana Court of Appeals held that the fence did not pose an unreasonable risk of injury to the child since the barrier was fully visible and the child had gone over it many times before. The injury resulted from the fact that the child was running and tripped over the barrier.[44]

The next two cases deal with the issue of security at school athletic contests. In a Louisiana case, parents whose son was fatally stabbed while attending a high school football game sued the school board which had rented the stadium to the high school for the contest. The student was stabbed by a third party and there was no history of violence between the schools nor of weapons in the stadium. The Louisiana Court

42. Wicina v. Strecker, 747 P.2d 167 (Kan. 1987).
43. Wagenblast v. Odessa School Dist. No. 105-157-166J, 758 P.2d 968 (Wash. 1988).
44. Lejeune v. Acadia Parish School Bd., 517 So. 2d 1030 (La. Ct. App. 1987).

of Appeals held that the lessor school board had no duty under the terms of the lease to provide security for the event. Additionally, there was no indication of any specific knowledge of potential danger to which the lessor had a duty to respond.[45]

In a case out of Mississippi, a patron of a football game was attacked in the parking lot of the school stadium after the game. The plaintiff brought an action against the school district on the basis that it failed to provide a reasonably safe area from which to leave the stadium. The Fifth Circuit Court of Appeals ruled that this action was barred by Mississippi law regarding sovereign immunity.[46]

EMPLOYMENT

Eighteen cases which dealt with employment issues were decided in 1988. Seven of those cases involved adverse employment decisions, three concerned contract disputes, three were based on race discrimination, two dealt with sex discrimination, and three cases pertained to first amendment issues.

Adverse Employment Decisions

General. In a five-to-four decision, the United States Supreme Court spoke to the issue of whether the NCAA is to be considered a "state actor." The NCAA had ordered a state university (UNLV) to suspend its basketball coach following extensive violations of NCAA rules. The coach, Jerry Tarkanian, sought injunctive relief alleging violations of section 1983. The Nevada Supreme Court held that the actions of the NCAA were "state actions" and that procedural due process was required.[47]

The High Court reversed this ruling finding that the NCAA's participation did not constitute state action. The university's decision to adopt the NCAA's rules did not make them state rules, since UNLV retained the power to withdraw from the NCAA. Furthermore, there was no delegation of government power from UNLV to the NCAA.[48] The dissent, written by Justice White, took the position that the NCAA acted jointly with UNLV in suspending Tarkanian, thereby becoming a state actor.[49] The dissent relied upon *Dennis v. Sparks*[50] as precedent for this proposition.

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45. St. Pierre v. Lombard, 512 So. 2d 1206 (La. Ct. App. 1987).
46. Boyd v. Gulfport Mun. Separate School Dist., 821 F.2d 308 (5th Cir. 1987).
47. *See* The Yearbook of Education Law 1988 at 190, Tarkanian v. NCAA, 741 P.2d 1345 (Nev. 1987).
48. NCAA v. Tarkanian, 109 S. Ct. 454 (1988).
49. *Id.* at 466.
50. Dennis v. Sparks, 449 U.S. 24 (1980).

Refusal to Renew Coaching Contract. A California high school baseball coach who was tenured as a teacher did not have his coaching contract renewed. He had held this coaching position for the past seven years. His suit against the school district was based on a deprivation of his constitutionally protected property and liberty rights in his coaching position. The Ninth Circuit Court of Appeals found that there was no protectible property interest involved. The plaintiff did not have tenure in his coaching assignment nor was there any "custom" of creating tenure for coaches. Also, there was no liberty interest involved since there was no stigma attached to the nonrenewal.[51]

In a case out of Wyoming, the contract of a high school basketball coach was not renewed. Although the depositions of the board members revealed that there was discussion in an executive session regarding the plaintiff's excessive profanity and abuse of players, the board gave no reasons publicly for the nonrenewal of the contract. The plaintiff sued the school district based on a deprivation of his liberty interests without due process. The jury awarded the plaintiff $33,000. However, the district court granted the defendant's motion for judgment notwithstanding the verdict. The court cited *Board of Regents of State Colleges v. Roth*[52] for the proposition that the plaintiff in order to prevail needed to show a "stigma plus." Since the plaintiff still retained employment with the defendant, there was no violation of a liberty interest.[53]

Two probationary high school teachers sued the county board of education for a refusal to renew their teaching contracts. They were not rehired since they were no longer needed to serve as assistant football coaches because a new head football coach had been hired. Both teachers were originally hired based on their ability to coach football. They were both teaching mathematics although neither had teaching experience in that area. The North Carolina Court of Appeals held that the defendant did not act arbitrarily or capriciously in refusing to renew their teaching contracts because of a head coaching change. The new head coach should be entitled to flexibility in developing his own staff.[54]

Resignation. In a Kansas case, two tenured teachers sought an injunction against the school board to reinstate them as full-time teachers. Both of these teachers had served as junior high school coaches pursuant to supplemental contracts. When they resigned their coaching duties the board also reduced their teaching contracts from full time to six-sevenths on the basis that the last period of the day which they had taught was really a part of their coaching contract since this period was used as

51. Lagos v. Modesto City Schools Dist., 843 F.2d 347 (9th Cir. 1988).
52. Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972).
53. Diehl v. Albany County School Dist. No. 1, 694 F. Supp. 1534 (D. Wyo. 1988).
54. Abell v. Nash County Bd. of Educ., 365 S.E.2d 706 (N.C. Ct. App. 1988).

practice time for junior high teams. Thus, the board took the position that this class was a part of the teachers' supplemental contracts. The Kansas Supreme Court disagreed and found for the teachers. The plaintiffs were within their rights to resign their supplemental contracts without affecting their primary teaching duties.[55]

Neglect of Duty. A tenured teacher who was also the cheerleader sponsor was dismissed for neglect of duty after she allowed the cheerleaders to drink beer at their hotel room and also drank beer with them. The Colorado Court of Appeals upheld the dismissal.[56] The Colorado Supreme Court affirmed this ruling finding that it was within the school board's discretion to dismiss her under these circumstances.[57]

In a commentary regarding the importance of interscholastic athletics, a teacher was dismissed for her alleged misconduct in refusing to return to her teaching duties. The plaintiff, an English teacher, had the school's star basketball player in her early morning class. The player had a number of absences in her class and she reported this to the principal. She assigned makeup work to the player, which he did not complete, and he continued to miss class. At the end of the grading period she gave the player the grade of "F." Thereafter, she received numerous threats to her safety from community members and athletic department personnel because of the grade given to the star player. Finally, the principal asked her to change the grade in exchange for a good teaching evaluation. The plaintiff, in severe emotional distress, changed the grade to a "D-" and left the building. The plaintiff then sought treatment from a psychiatrist and was unable to return to her teaching duties. Although the superintendent knew that she was under psychiatric treatment, he suspended her for not returning to work and then discharged her for dereliction of her duties. The Supreme Court of Tennessee found that the teacher was not guilty of misconduct and ordered her reinstatement.[58]

Contract Disputes

In a case out of Minnesota, a tenured associate professor who served as the recreational sports director at a university challenged his termination as a violation of his constitutional rights and a breach of contract. There was extensive evidence to show that the plaintiff misused the university's personnel, name, and resources. Pursuant to the Tenure Code a hearing was held at which the due process rights of the plaintiff

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55. Hachiya v. Board of Educ., Unified School Dist. No. 307, Salina County, 750 P.2d 383 (Kan. 1988).

56. *See* The Yearbook of School Law 1987 at 192, Blaine v. Moffat County School Dist. No. 1, 709 P.2d 745 (Colo. Ct. App. 1985).

57. Blaine v. Moffat County School Dist. No. 1, 748 P.2d 1280 (Colo. 1988).

58. McGhee v. Miller, 753 S.W.2d 354 (Tenn. 1988).

were fully protected. The plaintiff argued that even if his dismissal as recreational sports director was warranted, he should not also lose his position as associate professor. The Eighth Circuit Court of Appeals disagreed with the plaintiff since it found that the character defects disclosed by his conduct would also impair his ability to perform as a faculty member.[59]

In a Kentucky case, a sports broadcaster sued the NCAA for intentional interference with prospective contractual relations. The NCAA, in asserting its right to approve announcers for the broadcasting of NCAA televised football contests, did not approve of the plaintiff, thus preventing him from announcing NCAA games. The Kentucky Supreme Court held that the NCAA used this right of approval in good faith. There was evidence to show that the plaintiff was more strongly identified with professional football than with collegiate football. Additionally, the plaintiff had been suspended from professional football for gambling offenses and he has a well-known reputation as a playboy. These were all legitimate reasons for the NCAA to object to his announcing NCAA games.[60]

A tenured physical education teacher was denied reappointment as the varsity football coach. The collective bargaining agreement had a provision that no teacher shall be deprived of a "professional advantage without just cause." The coach went to arbitration on the basis of this clause. The court held that there could be arbitration regarding the manner in which teacher evaluations were conducted but that the above clause related to a nondelegable duty of the board to assess the qualifications of coaches and was thus not subject to arbitration.[61]

Discrimination

Race. The first race discrimination case was a request for a rehearing by the Fifth Circuit Court of Appeals on the issue of the applicability of the doctrine of respondeat superior in a section 1981 action. In this case a white coach, a minority at his school, had brought a race discrimination suit. The Fifth Circuit Court of Appeals had ruled that the plaintiff had established a prima facie case of discrimination. It also ruled that respondeat superior was inapplicable in a section 1981 claim to impose liability upon the school district.[62] At this time the court

59. Mueller v. Regents of Univ. of Minn., 855 F.2d 555 (8th Cir. 1988).

60. NCAA *ex rel.* Bellarmine College v. Hornung, 754 S.W.2d 855 (Ky. 1988).

61. Riverhead Cent. School Dist. v. Riverhead Cent. Faculty Ass'n, 528 N.Y.S.2d 611 (App. Div. 1988).

62. *See* The Yearbook of School Law 1987 at 193, Jett v. Dallas Indep. School Dist., 798 F.2d 748 (5th Cir. 1986).

denied the athletic director's and coach's motion for a rehearing thus reaffirming its position regarding respondeat superior.[63]

In a case out of Alabama, a black male basketball coach was removed from his coaching duties. He alleged that he was removed from his position because of racial discrimination. The federal district court agreed finding that the removal of the coach based on his win-loss record and the availability of an allegedly more qualified coach were mere pretexts for discrimination. There were a number of other coaches in the school system who also had poor win-loss records but were retained. Also, the evidence clearly showed that the principal did everything possible to undermine the plaintiff's authority and to show favoritism to the white coach who was to succeed the plaintiff.[64]

A black male physical education teacher who also coached the eighth grade football team alleged racial discrimination when he was temporarily transferred to the transportation department and then reassigned to teach secondary science. He was also relieved of his coaching responsibilities. In this situation, the federal district court in Texas found that the transfers were not precipitated by racial discrimination. The plaintiff was transferred and removed from coaching after he tackled a student-athlete. It was within the discretion of the school district to temporarily reassign him to nonteaching duties since his contract had no provision limiting the school district's right to modify his duties.[65]

Sex. In a case out of Minnesota, a female assistant softball coach brought a sex discrimination action against the university when it failed to promote her to full-time status. The plaintiff had been a part-time softball coach at the university since 1977. In 1983 she requested that she be given full-time status, but the request was denied. There were similar requests from other part-time coaches at that time and the university did grant full-time status to the male assistant coach of women's gymnastics. The plaintiff alleged that the consent decree which existed due to a prior sex discrimination suit was violated since the university did not use written, sex-neutral criteria to make the decision regarding her full-time appointment. The Eighth Circuit Court of Appeals found her arguments unpersuasive. The decision made here was a programmatic and budgetary decision which did not require the use of the criteria set forth in the consent decree.[66]

A female physical education teacher sued the school district to recover for the allegedly discriminatory denial of her application for the position of athletic director. In this title VII case, the defendant school

63. Jett v. Dallas Indep. School Dist., 837 F.2d 1244 (5th Cir. 1988).
64. Jackson v. Birmingham Bd. of Educ., 695 F. Supp. 1164 (N.D. Ala. 1988).
65. Dooley v. Fort Worth Indep. School Dist., 686 F. Supp. 1194 (N.D. Tex. 1987).
66. Sennewald v. University of Minn., 847 F.2d 472 (8th Cir. 1988).

district argued that the position for which the plaintiff applied was not "available" since the position was not simply athletic director but rather head football coach/athletic director, a position for which she was clearly not qualified. The Mississippi federal district court found that this "combined" position was simply an impermissible preference which unlawfully excluded the plaintiff from consideration for the position of athletic director.[67]

First Amendment Issues

In this case which was heard by the Circuit Court of Appeals in the District of Columbia, a former athletic director sued the university to challenge his termination. He alleged that his termination violated his rights of free speech. The plaintiff was hired in 1983 to bring the university into full compliance with NCAA rules. As time went on, the plaintiff spoke openly regarding various violations of NCAA rules much to the chagrin of the university president and the board of trustees. The court relied upon *Pickering v. Board of Education*[68] and *Connick v. Myers*[69] as precedent in arriving at its decision. First, it is obvious that the matters about which the plaintiff spoke are matters of public concern. However, the plaintiff was considered to be a "policy level official" at this university. Thus, the university had an important interest in showing that the plaintiff was indeed compatible with the president and the board of trustees. He therefore can be dismissed for expressing views that display a policy disagreement with his superiors because there would be a question of his ability to carry out the policy choices of his superiors in a vigorous manner.[70]

A high school teacher in Indiana was dismissed from his teaching position allegedly in retaliation for statements he made to the local newspaper regarding his dissatisfaction with the school board's decision to replace him as basketball coach. The Seventh Circuit Court of Appeals looked to the *Connick* decision to resolve this matter. The statements made by the plaintiff were solely to make a self-serving point about his termination as basketball coach. They were related to a matter of personal concern and thus did not fall into the realm of constitutionally protected speech. The appellate court affirmed the district court's ruling which granted the defendant's motion for summary judgment.[71]

In a case from Arkansas, a nonprobationary teacher appealed from a

67. Wynn v. Columbus Mun. Separate School Dist., 692 F. Supp. 672 (N.D. Miss. 1988).
68. Pickering v. Board of Educ., 391 U.S. 563 (1968).
69. Connick v. Myers, 461 U.S. 138 (1983).
70. Hall v. Ford, 856 F.2d 255 (D.C. Cir. 1988).
71. Vukadinovich v. Bartels, 853 F.2d 1387 (7th Cir. 1988).

decision of the school board not to renew his teaching contract because of insubordination. The teacher had been belligerent at faculty meetings and in private meetings with the principal. However, the plaintiff alleged that the real reason for his dismissal was the statements he made in class regarding the lack of black cheerleaders at the school. The Arkansas Court of Appeals held that even if the statements made in class were constitutionally protected, the evidence showed that the failure to renew his contract related directly to his insubordinate and belligerent behavior.[72]

MISCELLANEOUS

The miscellaneous category includes three cases which deal with public records and one case concerning collective bargaining.

Public Records

Broadcasters and newspapers brought an action against the NCAA and the Southwest Athletic Conference to compel disclosure of information relating to the misconduct of member institutions. Two universities which wished to intervene in the action were denied permission to do so.[73] The Fifth Circuit Court of Appeals held that the NCAA and the Southwest Athletic Conference were not governmental bodies. Therefore, they were not subject to the requirements of the Texas Open Records Act. The district court's ruling for the plaintiffs was reversed.[74]

In Oklahoma, news media sought access to a letter of inquiry which was sent from the NCAA to Oklahoma State University. The issue was whether the media had a first amendment right of access to the letter. The federal district court held that there was no tradition of access in this state to the letter and that such access would not play a positive role in the ongoing investigation. The defendant's motion to dismiss was granted.[75]

A Texas newspaper sought a writ of mandamus to compel the president of Texas A & M University to disclose information regarding the recruitment of a high school athlete. The president had not acceded to the newspaper's request to disclose such information nor had he, as required under Texas law, sought the attorney general's opinion regarding disclosure. This failure to do so led to a presumption that the material

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72. Caldwell v. Blytheville Ark. School Dist. No. 5, 746 S.W.2d 381 (Ark. Ct. App. 1988).

73. *See* The Yearbook of Education Law 1988 at 195, Kneeland v. NCAA, 806 F.2d 1285 (5th Cir. 1987).

74. Kneeland v. NCAA, 850 F.2d 224 (5th Cir. 1988).

was public. The Texas Court of Appeals therefore affirmed the issuance of the writ of mandamus.[75]

Collective Bargaining

The organizers of a group of college basketball officials petitioned the Third Circuit Court of Appeals for a review of the National Labor Relations Board decision that the Big East Athletic Conference did not violate the National Labor Relations Act in its refusal to bargain with the group of officials. The court found substantial evidence to support the finding that the officials acted as independent contractors. Therefore, for the purposes of the Act they are not employees and the refusal to bargain with them is not an unfair labor practice.[76]

75. Combined Communications Corp. of Okla., Inc. v. Boger, 689 F. Supp. 1065 (W.D. Okla. 1988).

76. Vandiver v. Star-Telegram, Inc., 756 S.W.2d 103 (Tex. Ct. App. 1988).

77. Collegiate Basketball Officials Ass'n, Inc. v. NLRB, 836 F.2d 143 (3d Cir. 1987).

7

FINANCE

Bettye MacPhail-Wilcox and Bruce Beezer

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Introduction

In 1988, there were two United States Supreme Court decisions regarding school finance. One decision upheld the constitutionality of a North Dakota statute regarding transportation fees, and the other decision ruled that interest from state and local government bearer bonds was subject to federal income taxation. There were also a number of federal appellate court decisions. These decisions ruled on issues associated with chapter 1 fund reimbursement. Another decision dealt with misspent federal funds in a special education program. Allocation of capital expenditures by local school districts due to a desegregation settlement was determined in another decision. Finally, the constitutionality of chapter 1 expenditures for mobile classrooms to sectarian schools was decided.

During this reporting period, state courts litigated cases concerning both substantive and procedural issues related to a state's school finance system, continuance of teacher salary supplements, disputed state aid calculations, school fees, and athletic activity funds. School tax cases dealt with questions associated with assessment, collection, exemptions, uses, elections, and disbursement. Other cases ruled on interdistrict tuition cost and bond referenda. Finally, Massachusetts' highest court determined what were allowable costs incurred by a nonprofit charitable corporation for special education services.

PUBLIC FUNDS FOR PRIVATE SCHOOLS

The Court of Appeals, Eighth Circuit, upheld a lower court ruling that plaintiffs lacked standing as federal and Missouri taxpayers to challenge executive implementation of chapter I funds under the Education Consolidation and Improvement Act of 1981 (Act).[1] The plaintiffs argued the guidelines of the Act violated the establishment clause by authorizing the use of mobile vans or other mobile classrooms to provide chapter I services on sectarian school-owned land. The plaintiffs first argued that their standing to sue as federal taxpayers could be established solely on the allegation that executive implementation of a congressional spending program violates the establishment clause. The court stated that under *Flast v. Cohen*[2] and *Valley Forge Christian College v. Americans United for Separation of Church and State*[3] "federal taxpayers do not have standing to challenge executive action which is 'arguably authorized' by a congressional act, whether that act is passed pursuant to the taxing and spending clause or some other constitutional provision."[4] The plaintiffs' second contention was that they had standing as state taxpayers because they had an interest in the use of local tax revenue. This claim was premised on the belief that the school districts used local funds to maintain the public school program because of the high percentage of federal funds withheld for the services provided the sectarian schools. Evidence showed, however, that Missouri educational agencies were bypassed; therefore, no state or local tax revenues were used to provide the services to the sectarian schools.

The Supreme Judicial Court of Massachusetts reversed and remanded the Rate Setting Commission (RSC) decision to disallow costs for services provided by a third party to a nonprofit, charitable education

1. Pulido v. Bennett, 848 F.2d 880 (8th Cir. 1988). *See* The Yearbook of School Law 1986 at 199.
2. 392 U.S. 83 (1968).
3. 454 U.S. 464 (1982).
4. Pulido v. Bennett, 848 F.2d 880, 885 (8th Cir. 1988).

corporation.[5] The plaintiff, who provides services to special education children, had submitted incurred costs billed by another nonprofit corporation for services. The RSC refused to pay the third party costs because they included a profit—a violation of its policy. The plaintiff argued that state regulations did not disallow a supplier's profits, only that the costs be reasonable when judged by the "prudent buyer concept." The court found the RSC had not performed the prudent buyer concept analysis by comparing the school's costs to those of comparable agencies.

SOURCES AND ALLOCATIONS OF PUBLIC SCHOOL FUNDS

State School Finance Programs

The Supreme Court of South Carolina issued an opinion regarding the constitutionality of the state's public education financing system. West Virginia's highest court ruled, in one opinion, on the constitutionality of a statute mandating salary equity and, in another decision, on reductions in state expenditures for education. The Supreme Court of Louisiana decided the constitutionality of the state's allocation to ensure a minimum foundation program. The Supreme Court of Arizona determined the correct royalty rate to be charged for mineral leases on school trust lands. A California appellate court determined whether the state should reimburse a local education agency for costs incurred when complying with the state's occupational safety and health law. Two decisions by Michigan appellate courts considered issues related to funding and the 180 day school year mandate. The Supreme Court of Alabama determined the constitutionality of the state's 1987 appropriations act. A Florida appellate court ruled on the methodology employed to determine the estimated level of assessment. Finally, the Eighth Circuit Court of Appeals issued an opinion on the amount the state was to reimburse local school districts for costs incurred due to an interdistrict desegregation plan.

Local taxpayers sought a declaratory judgment challenging the constitutionality of South Carolina's public education financing system.[6] They claimed the South Carolina Education Finance Act (EFA) and Education Improvement Act (EIA) required shared funding by the state and local school districts to provide a minimum education program.[7] This allocation of funding, the plaintiffs alleged, produced "disparate revenue and unequal educational opportunities because it was based

5. Little People's School, Inc. v. Rate Setting Comm'n, 525 N.E.2d 416 (Mass. 1988).
6. Richland County v. Campbell, 364 S.E.2d 470 (S.C. 1988).
7. S.C. Code Ann. §§ 59-20-10 *et seq.* (Supp. 1986) and 59-21-20 and 12-35-510 (Law. Co-op. 1976).

upon formulas that take into account the individual wealth of the various school districts."[8] Such an approach denies equal educational opportunity to students in violation of the state constitution.[9]

The Supreme Court of South Carolina affirmed a lower court's ruling for the state on three grounds emphasizing the distinction of the legislature being required "to pay" all costs of a public school system and "to provide" for its maintenance and support. The court first noted that the framers of the constitution "left the legislature free to choose the means of funding the schools . . . to meet modern needs."[10] Therefore, the legislature by enacting the EFA and EIA had chosen a legitimate means to provide education by using a shared funding formula. The court next stated that the statutes were valid because its own precedent stated "it is a cardinal principle that courts will presume the legislative act to be constitutionally valid, and every intendment will be indulged in favor of the act's validity."[11] The third ground used by the court was that the EFA provides for shared funding and allows poor districts to receive proportionally more state funds and to pay less local tax revenues for their public school operations. This compensating formula assures that all children will receive an equal educational opportunity regardless of district wealth.

West Virginia's highest court held that reductions in state expenditures for education for the 1987-88 fiscal year were unconstitutional.[12] The governor and legislature agreed that the reductions violated the constitutional provisions relating to education. However, a shortfall of more than $25 million between the state budget appropriations and estimated revenues required the cuts in order to balance the budget as mandated by another provision in the West Virginia Constitution.[13] The court stated that the balanced budget provision required the enactment of a "proper budget bill." This mandate had not been fulfilled because the constitution and school finance statutes gave public education a preferred constitutional status and the appropriated funds were insufficient to provide a "thorough and efficient school system."[14]

The same court, in another case concerning article 12, section 1 of the state constitution, ruled that a state statute violated equal protection rights.[15] Two county boards of education had petitioned for a writ of

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8. Richland County v. Campbell, 364 S.E.2d 470, 471 (S.C. 1988).
9. S.C. Const. art. XI, § 3.
10. Richland County v. Campbell, 364 S.E.2d 470, 472 (S.C. 1988).
11. *Id.*
12. West Virginia Educ. Ass'n v. Legislature of W. Va., 269 S.E.2d 454 (W. Va. 1988).
13. W. Va. Const. of 1872, art. 6, § 51 (1968).
14. W. Va. Const., art. 12, § 1.
15. State *ex rel.* Board of Educ. for County of Grant v. Manchin, 366 S.E.2d 743 (W. Va. 1988).

mandamus to have a "salary equity" statute declared unconstitutional.[16] The purpose of the statute was to encourage counties not to discontinue salary supplements after January 1, 1984. If they did, they would lose a pro rata equitable distribution of state equity funds. The plaintiffs had county-financed supplements paid from excess levy funds prior to January 1, 1984, but after that date the county voters rejected the excess levy. The State Board of Education subsequently considered the salary loss in its distribution of equity funds. The plaintiffs' contention was that the statute's effect permitted an unequal and discriminatory compensation system that resulted in salary reductions for their school personnel.

The court first noted that article 12, section 3 mandates a thorough and efficient system of free schools, and this mandate makes education a fundamental right. One means to provide all students with such a right is for county boards of education to have financial resources sufficient to employ and retain high quality personnel. This condition is not possible by a statute "which awards state equity funding for salary supplementation purposes in an amount based upon whether or not a particular county had in effect an excess levy to provide additional financing on a particular date."[17] The state also failed to present a compelling state interest to justify the discriminatory effect the statute had on the system of educational financing.

The Louisiana legislature has the authority to appropriate the funding level for public schools, subject only to the constitutional mandate that the funds are adequate to provide a minimum foundation program of education. In January 1986, the department of education sent a budget request to the legislature totalling approximately $976 million to fund the 1986-87 school year. The legislature appropriated some $42 million less than the requested amount. The plaintiffs sued, claiming the legislature had violated the Louisiana constitution because it had not funded the requested amount, using a funding formula it had approved in 1984 and again in 1985.

The Supreme Court of Louisiana reversed the trial court ruling that had granted plaintiff summary judgment and ordered the legislature to fund the requested amount.[18] The court made a distinction between a constitutional mandate to sufficiently fund a minimum foundation program and a funding formula that the plaintiff claimed set the level of funding. The court held that the "legislature is not required to fund the 'minimum foundation program' in accordance with a formula; the formula is a method for distribution of funds."[19]

16. W. Va. Code § 18A-4-5 (1985).

17. State *ex rel.* Board of Educ. for County of Grant v. Manchin, 366 S.E.2d 743, 749 (W. Va. 1988).

18. Louisiana Ass'n of Educators v. Edwards, 521 So. 2d 390 (La. 1988).

19. *Id.* at 394.

The Supreme Court of Arizona ruled unconstitutional a section of its Enabling Act (Act) which permitted the leasing of nonhydrocarbon minerals on school trust lands at a flat rate royalty.[20] The defendants, Arizona and mining operators, argued the Act and its subsequent amendments by the United States Congress gave Arizona full authority to set the terms of twenty year mineral leases, including the establishment of royalty rates.[21] Therefore, the Arizona statute which allowed leases at a flat rate royalty of 5% of the net values of the minerals produced from the claim was a legitimate exercise of legislative power, even if the rate resulted in some leases being less than the true value of the royalty interest.

The court first considered what had been Congress' intent in the Act of 1910 and the 1927, 1936, and 1951 amendments. After a comprehensive discussion on the history of the Act and pertinent wording, the court stated "the congressional intent to be derived from the record as a whole [does not permit] us to conclude the procedure *explicitly* authorized only for the lease of oil, gas, and hydrocarbon deposits is also to apply to other types of mineral deposits."[22]

The court next turned to whether the fixed rate royalty provision of the Arizona statute provided maximum revenue for school bonds consistent with the imposed trust principles required by the Act. The defendants had argued that the fixed rate would result in more trust income because it would encourage mineral exploration and development that would be discouraged by the more costly appraisal and true value scheme advocated by the plaintiff. The court rejected the argument because Arizona had one of the lowest royalty rates, and data showed exploration and development are affected more by market forces than royalty rates. These facts were sufficient for the court to rule that the effect of the statute violated the trust duty concept required by the Act.

A California appellate court ruled in favor of a school district regarding its statutory right to have a judicial hearing on the California Board of Control denial of reimbursement for financial costs incurred when complying with the California Occupational Safety and Health Administration Act.[23] The case was remanded to determine whether reimbursable costs have been mandated under the law.

The Supreme Court of Michigan considered whether the State Board of Education can require a local board to have 180 days of instruction in a school year.[24] The state board had appealed a denial for a

20. Kadish v. Arizona State Land Dep't, 747 P.2d 1183 (Ariz. 1987).
21. *Id.* at 1189.
22. *Id.* at 1192 (emphasis in original).
23. Los Angeles Unified School Dist. v. California, 245 Cal. Rptr. 140 (Ct. App. 1988).
24. State Bd. of Educ. v. Houghton Lake Community Schools, 425 N.W.2d 80 (Mich. 1988).

writ of mandamus to compel a local board to rescind its decision not to make up six snow days. The local board argued that the statutes on which the mandamus was requested did not mandate the 180 days, but was only a condition to receive state aid. After an extensive review of the statute's legislative history and case precedent, the court ruled that the local boards have discretion to determine the number of instructional days. If the local boards decide to operate less than 180 days, however, they will receive no state aid. In another case dealing with 180 days of instruction to receive state aid, the Court of Appeals of Michigan denied four days of aid to a local school district because it had employed uncertified teachers on those days when the certified teachers were out on strike.[25] The court said the statutory language mandating the penalty was clear in prohibiting the employment of uncertified teachers.

The Supreme Court of Alabama affirmed a lower court ruling that the 1987 general appropriation act was unconstitutional insofar as it contained funds appropriated from the Alabama Special Education Trust Fund (ASETF).[26] The misappropriated funds had been allocated to state agencies other than public schools for "ordinary expenses" they incur for "educational purposes." The specific issue considered by the court was whether appropriations to state agencies could be made from the ASETF in a general appropriations bill. The court first reviewed in detail the history and court precedents regarding the purpose of the ASETF and two constitutional provisions regarding appropriation bills.[27] Based on the review, the court stated that to allow appropriations from ASETF in a general appropriation bill would be to impose a test in addition to those imposed by section 71 (i.e., is it for educational purposes?).[28] This additional requirement would violate both the spirit and letter of sections 71 and 45. The court's main concern over a lack of criteria to determine a state agency's request for ordinary expenses for educational purposes was explained by an example. A highway is constructed by the Highway Department, claiming it as an ordinary expense as well as an educational expense because the highway benefited the transportation of children to school.

A Florida Court of Appeals ruled in favor of the methodology used by the department of revenue (DOR) in determining a county's estimated level of assessment.[29] The plaintiff alleged that a Florida statute required the DOR to use a quantitative method rather than a qualitative

25. Grand Rapids Educ. Ass'n v. Grand Rapids Bd. of Educ., 428 N.W.2d 731 (Mich. Ct. App. 1988).
26. Childree v. Hubert, 524 So. 2d 336 (Ala. 1988).
27. Ala. Const. art. IV, §§ 45, 71.
28. Childree v. Hubert, 524 So. 2d 336, 341 (Ala. 1988).
29. Jones v. Department of Revenue, 523 So. 2d 1211 (Fla. Dist. Ct. App. 1988).

one. A DOR economist had projected the assessment level to determine state school aid using an estimated growth rate that necessitated the economist to determine what data to include and what weight to ascribe to the data. The court ruled on the trial testimony of a tax expert, who observed that the method was widely accepted, that the economist had used the best available data in a systematic way, and that the statutory requirement of the use of the best available and professionally accepted methodology had been met.

The Eighth Circuit held that the state of Missouri had to reimburse two school districts for capital costs incurred pursuant to a desegregation settlement plan.[30] The settlement plan requires the interdistrict transfer of black students from the St. Louis school system to surrounding school districts. Two of the districts submitted costs as a result of their increased enrollment. One district had to reopen an elementary school and the other had to build more classrooms. After an extensive discussion regarding the phrase "one-time extraordinary costs" found in the settlement agreement, the court ruled the phrase "means those costs which are due, not to ordinary operation of a school district for its resident students, but are due to the presence of transfer students from outside the school district."[31] The court disallowed, however, requested reimbursement for books and instructional material as "one-time extraordinary costs" because the districts had received per-pupil state aid.

Local Funds for Education

There was one state court case on the reduction of school funds by a township's governing board and two state court cases on local teacher salary supplements. A New Jersey appellate court ruled that a township's governing board had filed a timely statement of reasons for its $183,300 reduction of funds from a school district's proposed budget.[32] The governing board had appealed the State Commissioner of Education's decision that the funds be restored because the stated reasons for the reduction were not filed with the certification of the school budget reduction to the County Board of Taxation. The court ruled the township's board had filed its reasons in a timely manner when it submitted the reasons in the answer to the school board's petition to the commissioner. The court reasoned that the reasons were available to the commissioner to make an informed decision as required by law.

A local school board in Alabama was found to have violated a state

30. Liddell v. Board of Educ., St. Louis, Mo., 839 F.2d 400 (8th Cir. 1988).

31. *Id.* at 406.

32. Board of Educ. of Township of Deptford v. Mayor and Council of Township of Deptford, 541 A.2d 1080 (N.J. Super. Ct. App. 1988).

statute when it unilaterally adopted a new teachers' salary schedule that eliminated the steps and increments previously included in the schedule.[33] The board claimed it had statutory authority to "fix the salaries of all employees," and its action was not a policy decision. The Civil Court of Appeals ruled that since the board had written salary policies it had made a policy decision. Therefore, the board should have obtained the local superintendent's written recommendation and consulted with the local educational agency as mandated by another statute.

The West Virginia Supreme Court of Appeals affirmed a lower court's ruling granting a declaratory judgment for a school district.[34] The local education association had sued, seeking reinstatement of a county salary supplement after the defeat of special excess levy referendums that contained the supplement funds. The association claimed that the school district had violated two statutes that required the priorization of budget cuts. The court ruled that one of the statutes, setting minimal teacher salaries, expressly stated that a local board could discontinue salary supplements funded by local excess levies when forced to do so by a levy's defeat. The court found that the second statute, indicating the priority guidelines, applied to budget cuts that reduced teacher employment, a condition not present in the cuts regarding salary supplements.

Federal Funds for Education

There were four federal appellate court decisions regarding the impermissible use of federal education funds. The Secretary of Education's interpretation was found reasonable by the First Circuit Court of Appeals in disallowing the Massachusetts Department of Education's reallocation of unexpended Education of the Handicapped Act (Act) funds.[35] The case facts were very specific because they concerned dates. Three local school districts had returned funds to the state on September 26, 1980 from their 1979 fiscal year allocations under the Act. The state did not issue warrants reallocating the funds to the three districts until October 28, 1980 and November 19, 1980. The reallocation of carryover funds is permissible for allowable expenses to special education programs. The secretary argued that since the funds were not reallocated prior to September 30, 1980, the end of the fiscal year, they were to be returned to the federal government. The state argued that because the districts had obligated and expended their own funds to allowable special education programs not funded in the 1979 fiscal year, the state

33. Baker v. Oneonta City Bd. of Educ., 519 So. 2d 1350 (Ala. Civ. App. 1988).

34. Summers County Educ. Ass'n v. Summers County Bd. of Educ., 365 S.E.2d 387 (W. Va. 1988).

35. Massachusetts, Dep't of Educ. v. United States Dep't of Educ., 837 F.2d 536 (1st Cir. 1988).

had met the September 30, 1980 deadline. The subsequent issuing of warrants in October and November of 1980 indicating the reallocation were no more than bookkeeping transactions.

The court, after reviewing various sections of the Act regarding the disbursement and reallocation of federal funds by a state agency, said they must be read in conjunction with the Tydings Amendment to the General Education Provisions Act.[36] While the Tydings Amendment extended the time frame to obligate federal funds, it did not extend the obligation and expended period past the next fiscal year beginning on the first of October. The state had not obligated and expended the federal funds by using warrants after September 30, 1980, therefore the secretary's interpretation was reasonable.

In a per curiam decision, the Ninth Circuit Court of Appeals reversed a lower court's ruling denying prejudgment interest on title I funds misspent by California.[37] The Secretary of Education had argued the *West Virginia v. United States* decision allowed prejudgment interest unless "state policy compels any deviation" from the general ruling that allows interest on debts due the United States.[38] The court said prejudgment interest should be allowed because it "will fully compensate the United States" and that the purpose of title I will be achieved by "ensuring the moneys appropriated . . . are devoted to service of the intended beneficiaries—disadvantaged children—rather than to the relief of California taxpayers."[39] The court also rejected the state's argument that *Pennhurst State School and Hospital v. Halderman* bars recovery of prejudgment interest because Congress did not clearly provide for such interest on misapplied title I funds.[40] The court said *Pennhurst* had been made inapplicable by the *Bell v. New Jersey* decision.[41]

The Ninth Circuit Court of Appeals, in another per curiam decision, upheld the Secretary of Education's order that California refund $410,872 for misspent title I funds.[42] The funds had been spent to conduct programs by a local school district under the Migrant Education Program. One program was a Counselor Training Program (CTP) that was a two-year graduate program with a state university to provide training to the district staff and other students in migrant student counseling. The students were required to spend 20% of their time counseling students. Another program was providing a flat fee of $50 per month for travel to student aides recruited from surrounding colleges. An audit by the Office of Inspector

36. 20 U.S.C. § 1225 (b)(1) (1982).
37. Riles v. Bennett, 831 F.2d 875 (9th Cir. 1987).
38. 107 S. Ct. 702 (1987).
39. Riles v. Bennett, 831 F.2d 875, 877 (9th Cir. 1987).
40. 451 U.S. 1 (1981).
41. 461 U.S. 773 (1983).
42. California Dep't of Educ. v. Bennett, 843 F.2d 333 (9th Cir. 1988).

General showed deficiencies in the documentation to support the CTP expenses because there was no identifying information on specific CTP participants and no evidence that their work had been done with migrant students. The secretary ruled that the funds spent on the CTP for 1980-81 and 1981-82 should be refunded because of the documentation errors and ordered a refund of the travel funds for the aides because they were spent in violation of federal regulations.

The court agreed that the secretary's ruling was reasonable. The evidence submitted by California on the CTP expenses "contained opinions and conclusions" about the counselors' involvement and the documentation contained no corroborating "evidence demonstrating that the counseling services were actually provided or supervised by LEA personnel."[43] The court also disallowed the travel costs, reasoning that the stipulated charges should be the same with those allowed in nonfederally sponsored activities. The flat fee method was not consistent with the local district's policy of reimbursing travel on a per-mile basis with supporting documentation of time, location, and distance.

The Secretary of Education's disallowance of $699,450 in title I expenditures by a California school district was the subject of another Ninth Circuit decision.[44] The three types of expenditure at issue were: (1) food and lodging for parent and staff-training conferences; (2) costs for attendance at multi-purpose education conferences; and (3) student field trip costs.

The secretary disallowed the food and lodging expenses for seven district sponsored conferences at hotels because they could have been held in district facilities. Also disallowed were food and lodging costs for two state-sponsored conferences held in Anaheim because they were within reasonable commuting distance. California made three arguments in defense of the costs. The first argument was that there were noneconomic benefits in holding the seven conferences in hotels (e.g., larger attendance). The court rejected the argument because California had presented no evidence to support the alleged participation benefit. The second argument was that since Los Angeles is so large it was not reasonable to require participants to commute each day. Again, California failed to show the participants for the seven district conferences had traveled more than twenty-five miles—a distance the state claimed was reasonable. In regard to the two state-sponsored conferences in Anaheim, the court remanded the secretary's disallowance to the Education Appeal Board to determine how many participants traveled more than twenty-five miles. The third argument made by California was that if the district sponsored conferences

43. *Id.* at 338.
44. California Dep't of Educ. v. Bennett, 849 F.2d 1227 (9th Cir. 1988).

had been held in its own facilities, there would have been charges for fair rental costs, labor and food costs, and travel expenses for some participants. These costs should have been credited against the disallowed expenses. The court agreed and remanded, with instructions that the state present evidence for the costs, other than the rental expense.

The court next considered the denial of expenditures for twenty-three conferences attended by program participants because the secretary regarded them to be general in purpose rather than title I specific. The state had presented no evidence, as required by federal regulations, to show that the main purpose of the conference was to share information relating to the grant program and that the training afforded was directly "related to the [t]itle I services to be provided during the school year."[45] This failure to provide the evidence was sufficient for the court to hold that the secretary's decision was reasonable.

The court reversed the secretary's disallowance of student field trip expenditures. The reason was that the secretary had not shown good cause. The disallowance had been premised on audit procedures that did not give the state sufficient information to refute specific expenditures.

School Fees

The United States Supreme Court decided on the constitutionality of charges for school transportation and two state court cases dealt with reimbursement procedures for book fee assistance. The Supreme Court ruled in *Kadrmas v. Dickinson Public Schools* that a North Dakota statute did not violate the equal protection clause because it allowed some school districts, and not others, to assess a fee for transporting students between home and school.[46] The statute allows nonreorganized school districts to charge a fee for student bus service, not to exceed estimated costs. The plaintiff initially sued the school district, a nonreorganized district, in state court seeking to enjoin the district from collecting any bus fee. The Supreme Court of North Dakota ruled that the statute did not violate the equal protection clause of the fourteenth amendment because it was "purely economic legislation," hence "must be upheld unless it is patently arbitrary and fails to bear any rational relationship to any legitimate government purpose."[47]

Justice O'Connor, who wrote the majority opinion, rejected the plaintiff's argument that the Court should apply the "heightened" (substantial relationship) scrutiny test to determine the constitutionality of the statute. The plaintiff had contended that the required bus fee unconstitutionally

45. 34 C.F.R. § 200.75 (1981).
46. 108 S. Ct. 2481 (1988).
47. Kadrmas v. Dickinson Pub. Schools, 402 N.W.2d 897, 902 (N.D. 1987).

deprived access to education to those who were too poor to pay. The Court first disagreed with the plaintiff's reliance on *Plyler v. Doe* as requiring the heightened scrutiny test.[48] Unlike the children in *Plyler*, the plaintiff in the present case had "not been penalized by the government for illegal conduct by her parents."[49] The plaintiff was denied bus service because her parents only refused to pay the same fee charged other families that used the service. The Court next rejected the plaintiff's argument that the Court's decisions in *Griffin v. Illinois*[50] and *Broddie v. Connecticut*[51] required heightened scrutiny because the government cannot withhold important services from those who are unable to pay for them. The reason that these cases were distinguishable was because the plaintiff in this case was not faced with a situation where the statute created a legal monopoly to the state for transporting students to school. In fact, the plaintiff's parents had used alternative means to get her to school. The Court, using the rational relationship test, concluded the user fee for the bus service was constitutional, and found it difficult "to imagine" why the district should have a constitutional obligation to offer it for free when it was not required to do so.

An Indiana Court of Appeals ruled in favor of a township trustee for refusing to reimburse a school district for student fee assistance.[52] The Indiana Code provides that parents who meet certain financial criteria are not required to pay for school books, supplies, and required class fees. The school district sued, claiming the trustee did not possess authority under the code to deny reimbursement for those parents who failed to appear in the trustee's office within a certain number of days from date of notification. While the trustee had authority to determine eligibility, the district argued that the parents' failure to appear did not establish their ineligibility. The court stated that under the law the trustee was the "Overseer of the Poor" and had the authority to establish procedures applicants must follow to qualify for assistance.

The same Indiana appellate court later ruled, however, that another township trustee violated the state code by requiring parents to sign voucher fees before reimbursing the school district.[53] The trustee had refused to reimburse $35,279 because parents of students who were eligible for assistance had failed to sign the voucher. The court rejected the trustee's argument for the self-imposed voucher requirement because it

48. 457 U.S. 202 (1982).
49. Kadrmas v. Dickinson Pub. Schools, 108 S. Ct. 2481, 2488 (1988).
50. 351 U.S. 12 (1956).
51. 401 U.S. 371 (1971).
52. South Bend Community School Corp. v. Portage Township of St. Joseph County, 520 N.E.2d 446 (Ind. Ct. App. 1988).
53. Schrader v. Mississinewa Community School Corp., 521 N.E.2d 949 (Ind. Ct. App. 1988).

would reduce fraud by the parents and assure that they received the assistance.

School Activity Funds

The state of West Virginia sought to compel the West Virginia Secondary School Activities Commission, a voluntary association, to transfer all existing funds and future deposits into a state account within twenty-four hours of receipt of funds.[54] The Supreme Court of Appeals denied the writ, holding that the moneys controlled by the commission were quasi-public funds, not moneys due the state.

SCHOOL TAX ISSUES

Cases pertaining to school taxes concerned legislation and administrative actions related to student tuition, tax caps, tax assessment and collection practices, the constitutionality of tax and bond elections, the disbursement of tax revenues, capital and civil bonds, and delinquent school taxes. The United States Supreme Court rendered a decision which may influence school bond elections.

Tuition

In Nebraska, statutes provide that taxpayers who reside in school districts without a high school send their children to districts with such a school. Tuition for these students is paid from tax funds generated by a nonresident school tuition levy on property located in the nonschool district. This provision attempts to satisfy the constitutional duty of furnishing free instruction in the common schools for all persons between the ages of five and twenty-one.[55]

Taxpayers in a nonresident high school district challenged the constitutionality of the tuition charged. They asserted that the statute was an unlawful delegation of legislative authority to the State Department of Education; that it was unconstitutional in that nonresident tuition charges could exceed the actual cost of educating nonresident high school students; and, that the nonresident tuition levy constituted taxation without representation. The trial court found merit in the arguments and declared the entire statute unconstitutional and void given the absence of adequate standards pertaining to the exercise of discretion by school boards in applying the power delegated by the legislature. An appeal was filed alleging that the trial court erred in its findings and in its decision to grant

54. West Virginia *ex rel.* Manchin v. West Virginia Secondary School Activities Comm'n, 364 S.E.2d 25 (W. Va. 1987).

55. Neb. Const. art. VII, § 1.

an injunction, and that the plaintiffs could suffer no harm by reducing the amount of nonresident tuition.

The Supreme Court of Nebraska agreed that part of the statute, as amended in 1984, was unconstitutional.[56] The statute did not set out reasonable limitations and standards to govern the receiving school district's determination of the tuition charge. However, the court held that the entire statute was not unconstitutional inasmuch as the invalid portions could be separated from the valid portions, enforced independently, and without doing violence to the intent of the legislature. Furthermore, the court held that the legislature did not unlawfully delegate authority and that the departure from a per pupil tuition cost was not unconstitutional so long as there was a reasonable and approximate estimate made on reasonably ascertainable facts and anticipated conditions.

Tax Assessment and Collection

Cases concerning assessment dealt with tax caps, tax equalization, and tax assessment and collection procedures. Two cases concerned attempts to invalidate a school district's tax levy.

In Georgia, taxpayers sought to enjoin a Board of Education from levying ad valorem taxes on real property which exceeded the tax cap in the state constitution. The Supreme Court of Georgia denied relief on the grounds that the excess levy resulted from obligations arising from the Quality Basic Education Act and the levy was within the exception to the tax cap allowed by the same act.[57] In New York, taxpayers attempted to invalidate a school tax levy on the basis of discrimination between owners of similar properties in different assessing units within a school district. An appellate court held the different proportions of property taxes constitutional.[58]

An amendment to the Arkansas Constitution provides that tax assessments and millage rates for personal and real property be equalized after reappraisal.[59] Wynne School District No. 9 voted an increase of three mills, which the collector of Cross County applied equally to real and personal property. Union Pacific Railroad Company filed suit to block the application of the new millage to personal property. The Arkansas Supreme Court found for the plaintiff, stating that the new millage could not be collected against personal property until the rates equalize.[60]

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56. Ewing v. Scotts Bluff County Bd. of Equalization, 420 N.W.2d 685 (Neb. 1988).
57. Hicks v. Arnall, 368 S.E.2d 733 (Ga. 1988).
58. Forward v. Webster Cent. School Dist., 526 N.Y.S.2d 870 (N.Y. App. Div. 1988).
59. Ark. Const. of 1874 art 16, § 14a (1982).
60. Clark v. Union Pacific R.R. Co., 745 S.W.2d 600 (Ark. 1988).

The Court of Common Pleas, Washington County, was within its right to reduce a tax assessment on coal property located in two school districts.[61] The court may determine the qualifications of expert witnesses and act as a fact finder to arrive at fair market values for property.

The Supreme Court of Ohio held that school districts cannot appeal the tax commissioner's public utility assessments on the basis of not having received notice of the valuation and apportionment of utility taxes.[62] Furthermore, such denial does not deny a district's right to due course of law as political subdivisions have no equal protection or due process rights vis-a-vis the state which created them.

The Quitman School District in Arkansas sued two county surety companies and two county clerks for failing to extend real estate taxes properly, thereby causing the loss of school revenue. A jury found the defendants negligent and responsible for 90% of the revenue losses to the school district. The trial court entered judgment against the defendants which the Supreme Court of Arkansas affirmed.[63]

Taxpayers in Ohio and Mississippi sought refunds of taxes improperly collected. Both the Supreme Court of Ohio[64] and the Supreme Court of Mississippi[65] essentially held that taxpayers could not recoup taxes erroneously paid when they did not comply with protest and notice requirements.

The Court of Appeals of Kentucky ruled that tax collectors are allowed a commission for expenses not less than 1% nor more than 4% of the school taxes collected.[66] However, tax collectors may not deduct their fees from the tax funds before paying the district boards of education.

Tax Exemptions

The Supreme Court of Florida held that the Palm Beach School Board was statutorily exempt from paying certain fees for connecting a school to the wastewater system of an environmental control district.[67] This finding prevailed even though the title of the legislation providing the exemption did not contain "utility."

Agricultural land in New York is exempt from property and school

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61. Ciaffoni v. Washington County Bd. for Assessment of Appeals, 535 A.2d 247 (Pa. Commw. Ct. 1987).

62. Avon Lake City School Dist. v. Limbach, 518 N.E.2d 1190 (Ohio 1988).

63. American Casualty Co. of Reading v. Quitman School Dist., 739 S.W.2d 144 (Ark. 1987).

64. Blisswood Village Homeowners Ass'n v. McCormack, 526 N.E.2d 69 (Ohio 1988).

65. Morco Indus. v. City of Long Beach, 530 So. 2d 141 (Miss. 1988).

66. Benson v. Board of Educ. of Bellevue, 748 S.W.2d 156 (Ky. Ct. App. 1988).

67. Loxahatchee River Envtl. Control Dist. v. School Bd. of Palm Beach County, 515 So. 2d 217 (Fla. 1987).

taxes.[68] However, when land previously exempt is not used for agricultural purposes as a result of a town's determination not to repair an access road, it is no longer subject to agricultural exemptions.

Use of School Tax Base Revenues

Cases concerning the use of school revenues pertained to lease purchase agreements, budget issues, and salaries. The Supreme Court of South Carolina held that lease purchase agreements entered into by a school district were not subject to limitations of the state constitution.[69] Lexington County School District enrollment expanded rapidly necessitating new construction and substantial renovation. However, bond referenda failed three times and the Board of Trustees pursued lease purchase agreements in order to provide facilities to accommodate students. Though the trial court held the lease purchase agreements unconstitutional, the Supreme Court reversed, stating that the lease purchase agreements were not general obligation debts requiring the governmental entity to impose property taxes for payment.

The Wilkes-Barre Area Vocational School in Pennsylvania is supported by five school districts which must approve the operating budget. Statutes provide that the budget must be approved by two-thirds of the participating districts. The 1986-87 budget was approved by only three districts. One of the districts which did not approve the budget sought a declaratory judgment. The trial court held that four out of five of the participating districts had to approve the budget. On appeal, a Commonwealth court held that two-thirds of the participating districts, or the next higher numerically possible fraction if the number of participating districts makes a two-thirds vote impossible, was an appropriate interpretation.[70]

A school district in Arizona lost an override election seeking approval for a 10% increase in the aggregate budget limitation. The governing board wanted to hold another election and the superintendent declined on the basis of advice from the county attorney that the proposed second election was illegal. The trial court denied the district's request to compel the superintendent to hold another override election. The Court of Appeals ruled that the second election would be illegal and that the district cannot compel the superintendent to perform an illegal act, even if the act is ministerial.[71]

Taxpayers in Oregon argued that an educational service district pre-

68. Van Nostrand v. Board of Assessors, 526 N.Y.S.2d 664 (App. Div. 1988).

69. Caddell v. Lexington County School Dist., 373 S.E.2d 598 (S.C. 1988).

70. Wilkes-Barre Area Vocational School v. Greater Nanticoke Area School Dist., 539 A.2d 902 (Pa. Commw. Ct. 1988).

71. Wilson Elementary School Dist. No. 7 v. Superior Court, 762 P.2d 626 (Ariz. Ct. App. 1988).

pared a budget which was not in compliance with the local budget law. The specific charges were that the composition of the budget committee was unconstitutional, that they did not show "substantial compliance" with the local budget law, that an addendum to the budget message was false and deceptive, and that the contingency fund line item was unreasonable and not based on past experience. The Tax Court ruled that it did not have authority over constitutional challenges, that the district did substantially comply with the budget law, and that the addendum was not false and deceptive. The Supreme Court of Oregon agreed and affirmed, noting that "substantial compliance" entails an effort to comply fully with the statutes and that failure to comply amount only to a minor error or irregularity.[72]

Two cases pertained to salary. The Supreme Court of Appeals of West Virginia held that nonteaching employees could not recover salary supplements based on a new scale which was in excess of the state minimum. The court held that voter approval of a special levy which does not require each employee to receive the supplemental salary allows the board to exercise discretionary judgment in such allocations on an annual basis.[73]

Teachers in the Lumberton Independent School District of Texas sued to block the district from implementing a tax rate which would not finance the salary schedule from the previous year. Following state cut-backs, Lumberton chose to reduce expenditures by reducing local supplements. Teachers argued they had a contractual right to the salary of the previous year. A Court of Appeals held that neither the statutes nor the contract used by the district created an implied or *de facto* agreement to continue the salary supplements which exceeded the mandated state minimum salaries.[74]

Tax Elections

Taxpayers in Illinois alleged that a school district attempted to circumvent tax limits imposed by the legislature by abolishing its working cash fund, transferring remaining funds into the educational fund, and then authorizing issuance of working class fund bonds within the limits established by statute. The taxpayers argued that these actions effectively supplemented the educational fund. An appellate court denied the taxpayers' objections.[75]

In Delaware taxpayers sought to have a special election for an

72. Gugler v. Baker County Educ. Serv. Dist., 754 P.2d 891 (Or. 1988). *See, e.g.*, Gugler v. Baker County Educ. Serv. Dist., 754 P.2d 900 (Or. 1988) and Gugler v. Baker County Educ. Serv. Dist., 754 P.2d 903 (Or. 1988).

73. Bane v. Board of Educ. of County of Monongalia, 364 S.E.2d 540 (W. Va. 1987).

74. Allen v. Lumberton Indep. School Dist., 746 S.W.2d 524 (Tex. Ct. App. 1988).

75. Application of Walgenbach, 520 N.E.2d 78 (Ill. App. Ct. 1988).

additional tax levy declared void. They charged that election officials improperly invalidated sixty ballots, thus ensuring the passage of the additional tax. After reviewing the facts and considering multiple criteria for voiding ballots, a Superior Court determined that the case had no legal merit.[76]

DeSoto Parrish School Board in Louisiana was sued by a group of business and property owners who opposed an election to authorize an ad valorem property tax and the issuance of bonds in four school districts for school construction. The property tax election was passed parrishwide, but the bond issue was passed in only two of the four districts. Opponents sought the invalidation of both.

A Louisiana Court of Appeals upheld the validity of the property tax election, noting that the courts do not entertain election contests unless shown that the matters complained of would have altered the election results.[77] The bond election was challenged as unconstitutional since all districts in the state had a bond indebtedness cap of 25% of assessed valuation with the exception that several special school districts had the authority to incur indebtedness at a 35% rate. The court held that this was unconstitutional in that the citizens in these special parrishes had been made "less equal" than other citizens in the state. The court declined to invalidate the election but did preclude the sale of any bonds exceeding the 25% debt limit.

Tax Revenue Disbursement

In Kansas, personal property taxes were assigned to the wrong school district as a result of a clerical error. The Supreme Court ruled that county commissioners have the power and duty to reassign current and recent prior year tax revenues to the proper district.[78]

When prior, rather than current year, assessed valuations are used to determine a portion of a school district's revenue, a deficiency tax may be added to the school district's next year levy. In Illinois this does not require notice of the extended tax deficiency to the taxpayers.[79]

Anderson County School District 1 applied for capital improvement funds for school construction in South Carolina. The application was approved by the State Board of Education and funds were transferred to the county treasurer. When the district sought disbursal of the funds to pay expenses incurred, the county board of education refused to counter-

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76. Spencer v. Smyrna Bd. of Educ., 547 A.2d 614 (Del. Super. Ct. 1988).

77. Concerned Business and Property Owners of DeSoto, Inc., v. DeSoto Parrish School Bd., 528 So. 2d 567 (La. Ct. App. 1988).

78. Application of Unified School Dist. No. 437, 757 P.2d 314 (Kan. 1988).

79. Application of County Collector of McHenry County, 518 N.E.2d 1250 (Ill. App. Ct. 1988).

sign the warrants and the treasurer did not disburse the funds. The district sought a writ of mandamus which was denied by the trial court. The South Carolina Court of Appeals reversed and remanded stating that the county board of education did not have discretionary authority to disapprove the disbursal of the funds.[80]

In Oregon, the legislature passed a statute limiting the liability of counties for interest earned on tax moneys and unsegregated tax collection accounts to any taxing district within a specified period of time. Prior to, and in anticipation of this legislation, Jackson County and nine school districts signed settlement agreements which stipulated that the districts would repay county money pending the passage and validation of the legislative statute. When the legislation was passed, Jackson County sought declaratory judgment for money paid to the districts in excess of the amount prescribed by the time limits set in the statute. The trial court found for the county and the school districts appealed, arguing that the trial court did not have proper jurisdiction to consider the validity of the legislation. They also alleged that the county committed fraud and evidenced breach of the contractual covenant of good faith. The Oregon Court of Appeals affirmed the trial court's decision.[81]

Ohio statutes provide for a ten mill limitation on taxes levied on any taxable property in a subdivision. Strongsville City School District, which had received 5.1 mills of the unvoted county millage since 1942, discovered it was due 5.6 mills and applied for the higher rate with the County Budget Commission. However, the budget was approved for only 5.1 mills. On appeal to the Board of Tax Appeals, the district's millage was increased to 5.6 mills for 1987. Subsequently, the millage in Columbia Township, where some of Strongsville District is located, was reduced from 3.3 to 2.8 mills. The two actions had the effect of increasing revenue to Strongsville by $696 while reducing revenue to Columbia by $31,420. The County Budget Commission and Township appealed, alleging that Columbia Township's millage could not be reduced since it had not requested a lower rate, that laches limited the Strongsville school board to the 5.1 mill rate accepted for forty-five years previously, and that the Columbia Township was guaranteed the minimum levy within the ten mill limit unless it requested a lower rate. The Supreme Court of Ohio affirmed the decisions made by the Board of Tax Appeals.[82] It noted that laches did not apply since Strongsville did not request a refund of past, reduced levies and that though the result of these decisions was harsh for

80. Anderson County School Dist. 1 v. Anderson County Bd. of Educ., 371 S.E.2d 807 (S.C. Ct. App. 1988).

81. Jackson County v. Jackson Educ. Serv. Dist., 752 P.2d 1224 (Or. Ct. App. 1988).

82. Board of Educ. of Strongville v. Lorain County Budget Comm'n, 526 N.E.2d 297 (Ohio 1988).

Columbia, it was not inequitable or unjust. Additionally, the court observed that Columbia had received a windfall since 1942 which was to the detriment of Strongsville.

Bond Issuance

The United States Supreme Court in *South Carolina v. Baker*, a case of original jurisdiction, ruled a federal tax statute did not violate the tenth amendment and state bond interest is not immune from federal tax.[83] The statute is the Tax Equity and Fiscal Responsibility Act of 1982 and, in particular, section 310 (b)(1) that removes the federal income tax exemption for interest earned on publicly offered long-term bonds issued by state and local governments unless the bonds are issued in registered form.[84] The congressional purpose for including the requirement of registered bonds was to reduce tax evasion concerns associated with bearer bonds.

Justice Brennan, who wrote the seven-to-one opinion, first considered South Carolina's argument that section 310 (b)(1) violated the tenth amendment because it regulates the state by prohibiting issuance of bearer bonds. The Court rejected the argument noting that *Garcia v. San Antonio Metropolitan Transit Authority*[85] set the limits on congressional authority to regulate activities (i.e., "that states must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity").[86] South Carolina failed to meet the *Garcia* standard, for it never alleged it was excluded from the national political process or in any way singled out.

South Carolina's second argument that section 310 (b)(1) "unconstitutionally violates the doctrine of intergovernmental tax immunity because it imposes a tax on the interest earned on a state bond" also was rejected.[87] In an extensive review of case law, the Court said the *Pollock v. Farmers' Loan and Trust* decision,[88] which had held any interest earned on a state bond was immune from federal taxation, had been overruled by subsequent decisions. Therefore, the Court concluded that there is "no constitutional reason for treating persons who receive interest on government bonds differently than persons who receive income from other types of contracts with the government."[89] The conclusion is that the tax collected is not collected from the state, but from the bondholder.

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83. 108 S. Ct. 1355, *reh'g denied*, 108 S. Ct. 2837 (1988).
84. 26 U.S.C. § 103 (j)(1) (1982).
85. 469 U.S. 528 (1985).
86. South Carolina v. Baker, 108 S. Ct. 1355, 1360 (1988).
87. *Id.* at 1362.
88. 157 U.S. 429 (1985).
89. South Carolina v. Baker, 108 S. Ct. 1355, 1367 (1988).

A Montana statute provides that bond issues have failed if less than 30% of registered voters listed cast votes. When the board of trustees disqualified 296 persons listed, those voting in a bond issue to renovate a high school building then constituted 30% of the registered voters. A writ of prohibition was granted by the Supreme Court of Montana.[90]

In California, the Morgan Hill Unified School District attempted to validate and sell bonds for capital improvements to a high school based on a ballot approving a surcharge for construction which was passed sixteen years earlier. The previous bond issue was passed for the purpose of constructing the high school which the board now desired to enlarge and improve. A California Court of Appeals held that the school district did not have the authority to amend the lease of and finance additions and improvements to the high school on the basis of the 1972 ballot.[91]

Under the North Carolina Constitution, the proceeds from forfeited civil bonds issued to secure one's presence in a custody dispute are payable to the county board of education.[92]

Delinquent School Taxes

Duvall County Vocational School District in San Antonio, Texas and others brought action against an estate executrix for delinquent taxes. The trial court entered judgment for the taxing agencies asserting that delinquent tax rolls were prima facie evidence of a proper levy whereupon the executrix appealed. A Texas Court of Appeals affirmed the decision.[93]

In Pennsylvania, the Fairfield Area School District enacted an amusement tax resolution in 1982 which provided for a tax of 5% on admissions to amusements doing business within the school district. Admissions included the sport of skiing, use of ski lifts and tows, rental of equipment, and purchase of ski lessons. In March 1984, a taxpayer who operated a ski resort in the district refused to pay the admissions taxes. The following October, the legislature amended enabling legislation to establish a 10% limit on admission taxes and a 40% limit on the cost of lift tickets and admissions to ski facilities. Fairfield District complained in November of 1985 to recover taxes owed by the operator of a ski resort. The taxpayer asserted that the tax resolution exceeded the taxing authority of the school district and that only fees for entering the ski area were subject to the tax resolution. The trial court determined the amount of the delinquent taxes on the basis of the old resolution and the new enactments and ordered the taxpayer to pay. A Commonwealth Court of Pennsylvania affirmed.[94]

90. Bischoff v. High School Dist. No. 4 of Lincoln County, 749 P.2d 533 (Mont. 1988).
91. Morgan Hill Unified School Dist. v. Amoroso, 252 Cal. Rptr. 1 (Ct. App. 1988).
92. Mussallam v. Mussallam, 364 S.E.2d 364 (N.C. 1988).
93. Parr v. Texas, 743 S.W.2d 268 (Tex. Ct. App. 1987).
94. Ski Roundtop, Inc. v. Fairfield Area School Dist., 533 A.2d 828 (Pa. Commw. Ct. 1987).

8

HIGHER EDUCATION

Robert M. Hendrickson
with
Dorothy E. Finnegan*

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INTRODUCTION

The higher education case law in 1989 is extensive. Some cases stand out as involving significant issues. For example, a university challenged a federal agency's award of a grant as being inconsistent with the law. Issues of discrimination based on race in a state system of higher education were litigated in two states under title VI. The Supreme Court ruled that a collective bargaining agent could not have access to an institution's campus mail service. Student issues included a case involving gay rights and a case involving freedom of religion, while a city antidiscrimination statute also was before the courts. Cases finding that alcoholism was not a handicap under federal law and the question of child support for college tuition round out the diversity of cases in this chapter.

INTERGOVERNMENTAL RELATIONS

The lead off case for this section concerns a conflict of interest question involving a board member. A federal district court judge served on the board of trustees of a private Louisiana university. In a case involving the possession of the title to property owned by the private university, the judge issued a ruling instead of disqualifying himself. The Supreme Court upheld a court of appeals decision[1] that even the appearance of impropriety should be sufficient to result in the judge, as board member, to disqualify himself.[2]

In a Georgia case, the court found that private colleges were non-profit corporations, not charitable trusts.[3] At issue was the question of whether a private college board, after merging with another private college, could close one of the colleges. The court ruled that since they were private corporations they had the power to both merge and close one of the colleges.

Legislation limiting the board of trustees' investment in companies doing business in South Africa was challenged in Michigan.[4] The court ruled that the board held statutory autonomy to decide how to invest its funds and that the statute violated the state constitution.

In Illinois, a board member sued to enjoin the college from supporting and funding a campaign to increase the tax revenues received by the college.[5] While the record shows that the college allowed the committee supporting the tax increase to use its facilities, there is no evidence to indicate that the college provided funds to the committee. The court found that the plaintiff lacked standing and should have taken her complaint to the board of trustees. In Texas, a court ruled that a university auxiliary organization could not bring suit against the institution without the authorization of the board of regents.[6]

In Missouri, the court declared an election of board members void and called for a reelection because ballots in one district did not contain the slate of candidates for the junior college board.[7] However, the court ruled that one candidate would not be disqualified because he did not vote in a specific precinct within the district. The court interpreted the law to require that the person simply had voted in the district prior to running for a board position and reversed the lower court decision disqualifying the candidate.

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1. Liljeberg v. Health Serv. Acquisition Corp., 796 F.2d 796 (5th Cir. 1986).
2. Liljeberg v. Health Serv. Acquisition Corp., 108 S. Ct. 2194 (1988).
3. Corporation of Mercer Univ. v. Smith, 371 S.E.2d 858 (Ga. 1988).
4. Regents of Univ. of Mich. v. State, 419 N.W.2d 773 (Mich. Ct. App. 1988).
5. Jenner v. Wissore, 517 N.E.2d 1220 (Ill. App. Ct. 1988).
6. Gulf Regional Educ. Television Affiliates v. University of Houston, 746 S.W.2d 803 (Tex. Ct. App. 1988).
7. Eversole v. Wood, 754 S.W.2d 27 (Mo. Ct. App. 1988).

In a question over legislative authority, an Alabama court nullified a section of an appropriations bill authorizing a degree program at a specific community college.[8] The court found that the state constitution requires that legislation be limited to one subject, and the approval of a degree program was outside the subject matter of an appropriations bill. Furthermore, the court found that the approval of the degree program was never reviewed by the Alabama Commission on Higher Education as required by law.

The question of a governmental agency's authority to regulate funds allocated for research was before the federal courts. An Ohio university challenged the award of a national center by the Secretary of the Department of Education where the consortium of institutions receiving the award did not meet the requirements under the law.[9] The court found that the federal statute required a single director and single location for the national center. These were matters to be considered at the time of the award and could not be negotiated by the Secretary of Education after the award. In a related case, the Eleventh Circuit Court of Appeals found that the Secretary of Education could require a college to repay a grant awarded under the Aid to Developing Institutions Act[10] where evidence indicated that the institution failed to provide adequate documentation of salary and fringe benefits costs.[11]

In another case, the court found that a private right of action and injunctive relief were available where a violation of the Hill-Burton Act[12] existed.[13] The court found that an Iowa hospital illegally counted patients aided under state-aid programs when filing for credit for the care of indigent patients under the Hill-Burton Act. In New York, the court ruled that a university hospital cardiac care unit did not qualify under medicare as a special care unit.[14]

In a case involving the award of a license to a proprietary institution, the court found that the institution must exhaust administrative remedies with the state licensing agency before utilizing court proceedings.[15] In a Maine accreditation case, a private accrediting agency could not be prevented from removing accreditation after the private college filed

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8. Wallace State Community College v. Alabama Comm'n on Higher Educ., 527 So. 2d 1310 (Ala. Civ. App. 1988).
9. Board of Trustees of Ohio State Univ. v. United States Dep't of Educ., 681 F. Supp. 460 (S.D. Ohio 1988).
10. Title III of The Higher Education Act of 1965, 20 U.S.C. §§ 1051 *et seq.* (1978).
11. Fort Valley State College v. Bennett, 853 F.2d 862 (Ga. Ct. App. 1988).
12. Public Health Servs. Act, 42 U.S.C. § 291 *et seq.* (1978).
13. Lile v. University of Iowa Hosp. and Clinics, 674 F. Supp. 288 (S.D. Iowa 1987).
14. University Hosp. N.Y. Univ. v. Bowen, 684 F. Supp. 1234 (S.D.N.Y. 1988).
15. New Trends Beauty School v. Indiana Bd. of Beauty Culture Examiners, 518 N.E.2d 1101 (Ind. Ct. App. 1988).

for bankruptcy.[16] The court found that accreditation was not property, nor was a private accrediting agency a governmental unit under the Bankruptcy Code. A Florida court found that a state agency had the legislative authority to require a correspondence school to set standards for a specific tuition refund policy.[17] Finally, an agency on ethical standards found that an attorney was involved in conflict of interest by representing a client in a suit against a university where he held an appointment as a full-time professor.[18]

Cases involving state sunshine laws were again before the courts. In one case, Northwestern University, a private institution, entered into an agreement with the city of Evanston to cosponsor the redevelopment of a downtown area through the establishment of a research park.[19] Two private for profit corporations were formed and the city, through public meetings, decided to provide public subsidies to invest in these corporations. At issue before the court was whether receipt of public subsidies by a private corporation brought it under the opened meeting and freedom of information laws mandating public access to minutes of board of directors meetings. The court ruled that the investment by the city did not make these private corporations "subsidiary bodies" of the city subject to the sunshine laws. A New Jersey court ruled that a state association of public college governing boards was subject to open meeting laws where the association received public funds from the member boards.[20] A West Virginia court found a symbiotic relationship between the state and a university hospital subjecting it to sunshine laws.[21]

In Wisconsin, a court refused to publicize the grades and attendance records of students as requested by a faculty member under prosecution in a criminal case.[22] The court found that the Family Rights and Privacy Act[23] mandated the privacy of individual student records. In South Carolina, a newspaper sought the disclosure of information on a board vote which took place sixty days prior to this suit.[24] The court found the lapse of time exceeded the sunshine law statute of limitations. However,

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16. Nasson College v. New England Ass'n of Schools and Colleges, Inc., 80 Bankr. 600 (Bankr. D. Me. 1988).
17. Associated Schools, Inc. v. Department of Educ., 522 So. 2d 426 (Fla. Dist. Ct. App. 1988).
18. *In re* Executive Comm'n on Ethical Standards, 537 A.2d 713 (N.J. Super. Ct. App. Div. 1988).
19. Hopf v. Topcorp, Inc., 527 N.E.2d 1 (Ill. App. Ct. 1988).
20. Council of N.J. State College Locals v. New Jersey State College Governing Bd., 545 A.2d 204 (N.J. Super. Ct. App. Div. 1988).
21. Queen v. West Virginia Univ. Hosps., 365 S.E.2d 375 (W. Va. 1987).
22. Rathie v. Northeastern Wis. Tech. Inst., 419 N.W.2d 296 (Wis. Ct. App. 1987).
23. Family Rights and Privacy Act, 20 U.S.C. § 1232g (1978).
24. Knight Publishing Co. v. University of S.C., 367 S.E.2d 20 (S.C. 1988).

when a public university's president failed to seek an opinion from the state attorney general on whether requested records on recruited athletes were exempt from the sunshine provisions under the current law, the records were assumed to be public.[25] The court also ruled that one of the records sought was for a person who was never a student, a category exempted under the statute.

Cases involving tax exemptions were also litigated. In Indiana, the state tax commission refused a tax exemption request by a private foundation which owned 31% of the interest in a student housing facility for which it had sole management.[26] The court found that the state legislature had authority to define tax exempt status based on ownership and not exclusively on use as alleged by the plaintiffs in this case. In New York, a court found that a faculty-student association should have filed an application for certification as a nonprofit, tax exempt organization, rather than seeking a declaratory judgment changing an assessor's determination of taxes owed on a parcel of land.[27] An Illinois court ruled that a fraternity house was exempt from tax because its primary use, the housing of students, was a legitimate educational purpose under the law.[28] In another case, a Georgia court found that a trade school chartered by a union where students are employed while learning a trade was not a "seminary of learning" exempt from tax.[29] The court found that the primary purpose of the school was to provide apprentices to building contractors. Finally, a state court found that McDonald's had entered into a lease arrangement rather than a license agreement and was subject to tax even though the college held tax exempt status.[30] The agreement was a lease where the institution clearly relinquished control of the area where the food service was to operate.

City zoning provisions were challenged in several states. In New Jersey, a court found that a city ordinance allowing single-family living units in residential areas was valid.[31] However, the court found that ten students living in a single-family dwelling constituted a single-family unit as defined by the law since they shared cooking, cleaning, and financial responsibilities for the dwelling. In another case, a foundation was denied a permit to use a building for educational purposes without receipt of a charter from the State Board of Regents designating it as an

25. Vandiver v. Star-Telegram, Inc., 756 S.W.2d 103 (Tex. Ct. App. 1988).
26. Indiana Univ. Found. v. State Bd. of Tax Comm'r, 527 N.E.2d 1166 (Ind. Tax Ct. 1988).
27. Faculty-Student Ass'n of State Univ. College at Buffalo, Inc. v. Town of Lyndon, 523 N.Y.S.2d 943 (Sup. Ct. 1987).
28. Knox College v. Illinois Dep't of Revenue, 523 N.E.2d 1312 (Ill. App. Ct. 1988).
29. Roberts v. J.A.T.T. Title Holding Corp., 366 S.E.2d 297 (Ga. Ct. App. 1988).
30. Stevens v. Rosewell, 523 N.E.2d 1098 (Ill. App. Ct. 1988).
31. Borough of Glassboro v. Vallorosi, 535 A.2d 544 (N.J. Super. Ct. Ch. Div. 1987).

educational organization.[32] In Pennsylvania, the court granted variance in zoning laws to build a parking lot located on land in a flood plain,[33] but a Massachusetts' court refused a university's variance request because it would harm a landowner whose property abutted the property in question.[34] In another case, a court found the proposed use of a newly acquired building violated the land use provisions in the deed, and a state agency had no authority to override them.[35]

Finally, a gas company installing a pipeline for a public university had the right to execute the power of eminent domain.[36] On reconsideration, the court affirmed this decision.[37]

In a Virginia zoning case, a law school charged the city with the taking of private property without due process when it refused to grant a variance on a parcel of land zoned residential.[38] The case was dismissed for failure to seek a remedy in state court. In a related issue, a court ruled that ownership was defined by the river bank where alluvian deposits resulted in the development of a bulkhead point in the river.[39]

A number of cases involve questions of the jurisdiction of the court or the police over a matter involving a higher education institution. In one case, the court found that a fraternity could be charged with disorderly conduct under the state criminal code for excessive noise, even though they could have been prosecuted under the lesser city noise ordinance.[40] In a case involving the rape of a college student, the student was denied a change of venue to the county where she resided.[41] The court found that recruitment, alumni solicitation, and fund raising by the college did not constitute the conduct of business in the county as defined by the law. In an unusual case, two security patrolmen caught removing money from a university safe where charged with illegal entry and could not claim they had a license or privilege to enter any building on campus because they were issued a master key.[42]

University hospitals were also involved in litigation. In one case, eleventh amendment immunity blocked a suit against a hospital by the deceased indegent's estate because he was denied service at a hospital

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32. Yeshiva & Mesivta Toras Chaim v. Rose, 523 N.Y.S.2d 907 (App. Div. 1988).
33. Snyder v. York City Zoning Hearing Bd., 539 A.2d 915 (Pa. Commw. Ct. 1988).
34. Bedford v. Trustees of Boston Univ., 518 N.E.2d 874 (Mass. App. Ct. 1988).
35. City of Harrisburg v. Capitol Hous. Corp., 543 A.2d 620 (Pa. Commw. Ct. 1988).
36. Vernocy v. T.W. Phillips Gas and Oil Co., 540 A.2d 1012 (Pa. Commw. Ct. 1988).
37. Vernocy v. T.W. Phillips Gas and Oil Co., 545 A.2d 969 (Pa. Commw. Ct. 1988).
38. Northern Va. School of Law v. City of Alexandria, 680 F. Supp. 222 (E.D. Va. 1988).
39. Pittman v. Administrators of Tulane Educ. Fund, 521 So. 2d 680 (La. Ct. App. 1988).
40. Commonwealth v. Alpha Epsilon Pi, 540 A.2d 580 (Pa. Super. Ct. 1988).
41. Grier v. Bauman, 419 N.W.2d 53 (Mich. Ct. App. 1988).
42. People v. Powers, 525 N.Y.S.2d 727 (App. Div. 1988).

emergency room.[43] Competitor hospitals failed in their attempt to prevent the expansion of the university hospital through a petition to the court to force the withdrawal of the certificate of need issued by the health facilities planning board.[44] In an Alabama case, a university hospital was granted an exemption from the certificate of need requirement because the equipment sought would be used for research.[45]

EMPLOYEES

Litigation in this area continues to be heavy. Sex and race discrimination dominate in terms of numbers of cases. The new civil rights law will impact these cases in the future.

Discrimination in Employment

Title VI. Cases under title VI, along with cases discussed in the subsequent section on title IX (and other federal antidiscrimination laws with program specific provisions), have been affected by the passage of the Civil Rights Restoration Act of 1988.[46] The Restoration Act applies the provisions of several antidiscrimination laws to the total organization or system, rather than limiting it to the specific program receiving federal funds as per the Supreme Court's interpretation of title IX in *Grove City College v. Bell.*[47]

The Restoration Act looms large in several cases charging discrimination in the maintenance of a dual system of higher education within state. In Louisiana, the court rejected the argument that *Bazemore v. Friday*[48] applies to cases involving the state system of higher education.[49] The federal district court, citing a Sixth Circuit Court decision,[50] found that state policies and practices which were racially neutral, allowing for student free choice of which higher education institution to attend but resulting in the maintenance of racially distinguishable institutions within the state, were not enough to bring the state system within compliance with

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43. Estate of Ritter v. University of Mich., 851 F.2d 846 (6th Cir. 1988).

44. Condell Hosp. v. Health Facilities Planning Bd., 515 N.E.2d 750 (Ill. App. Ct. 1987).

45. University of Ala. Hosp. v. Alabama Renal Stone Inst., Inc., 518 So. 2d 721 (Ala. Civ. App. 1987).

46. The Civil Rights Restoration Act of 1987, 42 U.S.C. § 2000d-4a.

47. *See* The Yearbook of School Law 1985 at 312; Grove City College v. Bell, 104 S. Ct. 1211 (1984).

48. *See* The Yearbook of School Law 1987 at 240; Bazemore v. Friday, 106 S. Ct. 3000 (1986).

49. United States v. Louisiana, 692 F. Supp. 642 (E.D. La. 1988).

50. *See* The Yearbook of School Law 1987 at 238; Geier v. Alexander, 801 F.2d 799 (6th Cir. 1986).

title VI. This decision was based on the fact that the percentage of black enrollment in predominantly white institutions had decreased and that white enrollment in predominantly black institutions had increased only slightly. This court also ruled that the United States had standing to bring a charge under title VI against a state, and that the Congress had not exceeded its authority in nullifying the Court decision in *Grove City* by passing the Restoration Act.

However, in Mississippi, the court reached a different finding.[51] Relying on *Bazemore*, the court conducted an extensive analysis of all aspects of the higher education policy and practices in the state of Mississippi. In a review of the history of the state institutions' admission and recruitment policies, faculty recruitment, assessment and development of institutional missions, program distribution and reduction, competition among educational centers, quality of instruction and research, equity in funding, and adequacy of facilities, the court found that the state has made a good faith effort to disassemble the state's duel system of higher education. The state's policies were found to be racially neutral, and the state was proven to have acted affirmatively to reduce the predominance of enrollment of one race at all of its institutions.

In an Alabama case, the court ruled on whether a technical college had achieved the status of a racially desegregated institution removing it from further court supervision. The school has operated under court supervision and various court orders commencing with a 1967 decision.[52] The district court found that having achieved such status the court supervision should be nullified. In a related case, a district court judge excused himself from presiding over any future discrimination cases involving the state system of higher education, while expressing disagreement in his opinion with this court ordered action.[53] The Eleventh Circuit Court had found that the judge's involvement as a state senator in higher education legislation, and his involvement as a lawyer in some of the desegregation cases, would bias his ability to make an equitable decision in these matters.[54]

Title VII. Procedural issues surround several title VII cases. In a Wyoming case involving a title VII charge of sexual harassment, the court found that it was not bound by the findings of a college grievance committee.[55] Furthermore, the court had not errored in allowing the former husband, whose testimony was damaging to the plaintiff, to testify when his name was not on the pretrial witness list. The court

51. Ayers v. Allain, 674 F. Supp. 1523 (N.D. Miss. 1987).
52. Lee v. Macon County Bd. of Educ., 267 F. Supp. 458 (M.D. Ala. 1967).
53. Lee v. Macon County Bd. of Educ., 681 F. Supp. 730 (N.D. Ala. 1988).
54. Lee v. Macon County Bd. of Educ., 692 F. Supp. 1277; *see also* The Yearbook of Education Law 1988 at 229, United States v. Alabama, 828 F.2d 1532 (11th Cir. 1987).
55. Long v. Laramie County Community College Dist., 840 F.2d 743 (10th Cir. 1988).

found issues existed to mandate trial on the plaintiff's civil rights claims against her supervisors. The Fourth Circuit court, reversing a district court, found that a plaintiff could sustain a charge against the board even though he only named the community college in the original administrative proceedings.[56] The Second Circuit Court upheld a lower court dismissal of a civil rights claim which involved title VII because of failure to state a redressable claim and comply with discovery orders.[57] However, another court refused to grant a summary judgment where the plaintiff alleged discrimination resulting from pregnancy.[58]

A number of cases involved the shifting burden of proof requirements in title VII cases. For example, the establishment of a *prima facia* case of discrimination was before the Eleventh Circuit Court in a case alleging sex discrimination in promotion.[59] The court found that the plaintiff failed to show she was qualified for promotion. Also, the plaintiff failed to show that an equally or less qualified male had been promoted. The court found that while a comparable male was also rejected for promotion, his credentials were stronger on publications than the plaintiff's. In a case involving a private university, the court refused to grant a summary judgment to give the plaintiff a chance to substantiate a claim that the reasons for dismissal of a guard were pretextual.[60] In a New York case, a hospital was granted a summary judgment in the termination of a hospital director who had complained about the hiring of a white female for another position.[61] The court found the institution had other legitimate reasons for the termination.

A full professor at a private Catholic university brought a claim of discrimination based on religious affiliation in the award of salaries and other employment benefits.[62] Using a statistical analysis, he attempted to show that non-Catholic faculty received a lower percentage increase in salary than did Catholics. Additionally, he claimed that Jesuit priests received lodging and food while other faculty were not offered these benefits. The court found that he failed to establish a *prima facia* case of discrimination and any statistical differences were removed when actual dollars instead of percentages of increases were substituted in the analysis. Furthermore, since Jesuit priests return all of their salary to the institution, providing them with the aforestated benefits was not found to be discriminatory.

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56. Alvarado v. Board of Trustees of Montgomery Community College, 848 F.2d 457 (4th Cir. 1988).
57. Sere v. Trustees of Univ. of Ill., 852 F.2d 285 (7th Cir. 1988).
58. Suarez v. Illinois Valley Community College, 688 F. Supp. 376 (N.D. Ill. 1988).
59. Wu v. Thomas, 847 F.2d 1480 (11th Cir. 1988).
60. Gomez v. Trustees of Harvard Univ., 677 F. Supp. 23 (D.D.C. 1988).
61. Manoharan v. Columbia Univ. College of Physicians & Surgeons, 842 F.2d 590 (2d Cir. 1988).
62. Tagatz v. Marquette Univ., 681 F. Supp. 1344 (E.D. Wis. 1988).

In a case on remand, a district court found that a university's decision to reopen a search and not hire the female who was the third candidate on the hiring list, was not a decision based on sex discrimination.[63] This case originated from a discrimination in hiring charge resulting from the decision of the sociology department committee that the female candidate did not meet the qualifications to fill an endowed chair shared by both the economics and sociology departments.[64]

Several class action cases were before the court. One involved an institution which was under a court order from a previous class action case.[65] The court found that the decision not to move a softball coach from a half-time to full-time position was a programmatic or budgetary decision, not a personnel decision covered by the court order.

Another case involving a class of university extension agents was an appeal of a district court decision on remand from the Supreme Court.[66] The Fourth Circuit Court remanded the case with instructions that, consistent with the Supreme Court findings, failure to eliminate salary discrimination emanating from pre-title VII discriminatory practices was a violation of the law.[67] Furthermore, the court found that a class of black extension agents should be certified to bring charges of discrimination in promotion decisions.

Another class action case has seen extensive action in the courts. The original case involved discrimination charges brought by the female faculty of a medical college. The district court found that the female faculty had failed to establish a *prima facia* case of disparate treatment and barred the disparate impact case because they failed to raise the claim.[68] On appeal, the case was remanded in light of the Supreme Court's ruling on multiple regression analysis admission of evidence in *Bazemore*.[69] On remand, the district court again dismissed the case, relying on the procedural bar of the disparate impact claim.[70] The circuit court, on appeal, has remanded the case to another district court, finding that while the words disparate impact were not used until midtrial, the basic thrust of the claim was

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63. Lamphere v. Brown Univ., 690 F. Supp. 125 (D.R.I. 1988); *see* The Yearbook of School Law 1987 at 242, Lamphere v. Brown Univ., 798 F.2d 532 (1st Cir. 1986).

64. Lamphere v. Brown Univ., 613 F. Supp. 971 (D.R.I. 1988); *see also* The Yearbook of School Law 1983 at 296, Lamphere v. Brown Univ., 685 F.2d 743 (1st Cir. 1982).

65. Sennewald v. University of Minn., 847 F.2d 472 (8th Cir. 1988); *see* The Yearbook of School Law 1985 at 311, Rajender v. University of Minn., 730 F.2d 1110 (8th Cir. 1983).

66. *See* The Yearbook of School Law 1986 at 233, Bazemore v. Friday, 751 F.2d 662 (4th Cir. 1984), rev'd. 106 S. Ct. 3000 (1986); *see* The Yearbook of School Law 1987 at 240.

67. Bazemore v. Friday, 848 F.2d 476 (4th Cir. 1988).

68. *See* The Yearbook of School Law 1984 at 284, 289, Sobel v. Yeshiva Univ., 566 F. Supp. 1166 (S.D.N.Y. 1983).

69. *See supra* note 66.

70. *See* The Yearbook of Education Law 1988 at 233, Sobel v. Yeshiva Univ., 656 F. Supp. 587 (S.D.N.Y. 1987).

clearly a disparate impact claim which should not be procedurally barred.[71] Furthermore, the court found that plaintiffs have presented substantial claims of continued discrimination emanating from pre-title VII salary decisions.

A district court case involving a class of females in a New York public institution yielded a finding of no sex discrimination against the class.[72] The court noted in deciding this disparate impact and disparate treatment case, that evidence of intentional discrimination in individual claims is relevant to class claims of disparate treatment, while evidence of classwide discrimination may show that the reasons in individual claims may be pretextual.[73] After an extensive analysis of all of the statistical evidence and their weaknesses, the court decided to use the statistical evidence but rely on anecdotal evidence to determine if the class was discriminated against due to sex. The court found no discrimination based on sex in any of the individual title VII claims and in only one of the equal pay claims. Thus, the finding was in favor of the institution on the class sex discrimination claim.

In a claim involving retaliation, the court found that the individual was not discriminated against either in the award of salary or retaliation through termination.[74] The court also found that the comparable male salary was actually slightly lower than the plaintiff's at the time of hiring and that the termination occurred prior to the institution's knowledge that she had filed charges with E.E.O.C.

In a damage settlement, the court found that the lower court had errored in viewing a secretarial position as comparable to a public relations job at a community college where termination was based on impermissible sex discrimination.[75] Additionally, the court found that interest should have been awarded on back pay.

Equal Pay Act. In a case alleging sex discrimination in employment practices and salary, the salary discrimination charge went to trial while the other issues resulted in a summary judgment for the institution.[76] The court found that the salary disparity was based on a merit system in which the plaintiff's refusal to teach certain courses became a valid factor. The teaching load issue was part of the controversy over the plaintiff's contract. The court found the terms of the contract were clearly spelled out in a letter which referred to the faculty handbook on teaching load. Discussions between the department chair and the plaintiff

71. Sobel v. Yeshiva Univ., 839 F.2d 18 (2d Cir. 1988).
72. Ottaviani v. State Univ. of N.Y. at New Paltz, 679 F. Supp. 288 (S.D.N.Y. 1988).
73. *Id.* at 298.
74. Seligson v. Massachusetts Inst. of Technology, 677 F. Supp. 648 (D. Mass. 1987).
75. Sellers v. Delgado Community College, 839 F.2d 1132 (5th Cir. 1988).
76. Willner v. University of Kan., 848 F.2d 1020 (10th Cir. 1988).

were never made part of the contract. Two other cases involving the sister of the plaintiff, another university professor who brought charges of sex discrimination, failed to establish a *prima facia* case resulting in rulings in favor of the university.[77]

Title IX. In a title IX case involving admission to five different medical schools where the Supreme Court[78] established a private right of action in title IX cases, the plaintiff found herself in court appealing a contempt order.[79] By filing an action in state court, a federal court issued a contempt citation based on previous litigation, a fine of $100 for each day in violation, and an order to prohibit her husband from representing her in subsequent actions. The court subsequently denied the bulk of a motion to amend the contempt order except as to the date the fine should begin accrual.[80]

As discussed under title VI, the Civil Rights Restoration Act of 1988 also expands the coverage of title IX from a specific program receiving federal financial assistance to the total institution or state system. In a title IX and equal protection claim under the fourteenth amendment, the court refused to grant the university a summary judgment.[81] The court found that material issues of fact existed requiring adjudication of the plaintiff's allegation of discrimination based on gender in participation in athletic programs, the award of athletic scholarships, the allocation of funds, the assignment of coaching staff, the allocation of funds for travel and accommodations, and the allocation of trainers, training services, dining services, housing, and publicity.

Age Discrimination. The lead off case in this section involves a Supreme Court decision.[82] The case, filed by a former employee of a university, brought a claim of age discrimination along with a number of state claims to the federal district court. After six months of fact finding, the petitioner asked that the federal age discrimination claim be withdrawn and the district court remanded the case to state court. The Supreme Court, on *certiorari*, ruled that the district court has the discretion to remand a case to a state court when pendent state claims remain after the withdrawal of all federal claims.

In a question of jurisdiction, a Catholic college alleged that the first

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77. Willner v. University of Kan., 848 F.2d 1023 (10th Cir. 1988); Willner v. University of Kan., 848 F.2d 1032 (10th Cir. 1988).

78. *See* The Yearbook of School Law 1980 at 119, Cannon v. University of Chicago, 441 U.S. 677 (1979).

79. Cannon v. Loyola Univ. of Chicago, 676 F. Supp. 823 (N.D. Ill. 1987); *see* The Yearbook of Education Law 1988 at 234, Cannon v. Loyola Univ. of Chicago, 116 F.R.D. 244 (N.D. Ill. 1987).

80. Cannon v. Loyola Univ. of Chicago, 687 F. Supp. 424 (N.D. Ill. 1988).

81. Haffer v. Temple Univ., 678 F. Supp. 517 (E.D. Pa. 1987); *see* The Yearbook of Education Law 1988 at 232, Haffer v. Temple Univ., 115 F.R.D. 506 (E.D. Pa. 1987).

82. Carnegie-Mellon Univ. v. Cohill, 108 S. Ct. 614 (1988).

amendment establishment and free exercise clauses prohibited the enforcement of the Age Discrimination in Employment Act[83] at religious affiliated institutions.[84] The court found that the relatively narrow focus of the ADEA does not entangle government in the affairs of religious institutions so as to implicate the first amendment religion clauses.

Other ADEA cases dealt with specific charges of discriminatory practices. In a New York case, the court found that the plaintiff had been notified of the discontinuation of the employer's contribution to the employee's pension plan after he reached the age of 65, even though he continued employment until 70.[85] The court also found that this practice did not violate the Employee Retirement Income Security Act of 1974.[86] In a California case involving hiring, the court found that the plaintiff failed to establish a *prima facia* case of age discrimination in two separate hirings under disparate treatment theory.[87] In one case, the plaintiff's failure to submit letters of recommendation meant he had failed to complete the application process and, therefore, could not sustain a claim. In the other instance, the court found that a member of the protected class was hired over the plaintiff and plaintiff's qualification were clearly inferior. In a Washington case involving violation of a state age discrimination law, the court found that the plaintiff had failed to establish that the defendant's reasons for termination were a pretext for age discrimination.[88]

However, several cases had different results. An Illinois case took a unique twist in that it involved not the claims surrounding the choice of early retirement, but rather alleged that those who chose to work until the mandatory retirement age were penalized by the way benefit packages were awarded, thus becoming a "subterfuge" in violation of ADEA. The court agreed and denied defendant's motion for summary judgment. A New York court found that a professor who had entered into a settlement agreement whereby full-time employment would be terminated and she would release the college from all liability, did not preclude a suit where the college refused part-time employment because of a policy of not employing anyone over the age of seventy.[90] In Arkansas, the court found that evidence was sufficient to support the jury finding of age discrimination and that interest on back-pay was appropriate as part of the damage award.[91]

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83. Age Discrimination Employment Act of 1967, 29 U.S.C. §§ et seq. (1978).
84. Soriano v. Xavier Univ., 687 F. Supp. 1188 (S.D. Ohio 1988).
85. Kadane v. Hofstra Univ., 682 F. Supp. 166 (E.D.N.Y. 1988).
86. Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1022(b), 1024(b)(1) (1976).
87. Levy v. Regents of the Univ. of Cal., 245 Cal. Rptr. 576 (Ct. App. 1988).
88. Grimwood v. University of Puget Sound, 753 P.2d 517 (Wash. 1988).
89. Karlen v. City Colleges of Chicago, 837 F.2d 314 (7th Cir. 1988).
90. Jochnowitz v. Russell Sage College, 523 N.Y.S.2d 656 (App. Div. 1988).
91. Price v. Arkansas College, 683 F. Supp. 712 (E.D. Ark. 1988).

Rehabilitation Act of 1973. Discrimination due to a handicap was before the court because of the termination of a blind employee of the Department of Education.[92] Affirming the district court opinion, the court found no error in the finding that efforts had been made to provide the blind employee with aids such as readers to perform his tasks. The court also found that the department had reduced the work load as another means to accommodate the handicap. While the court questioned why a blind person would be assigned a job requiring heavy research and reading, they found that accommodations were sufficient to hold that termination based on poor performance was not discriminatory.

Hiring Discrimination. An Illinois court found that the university security department's failure to hire a black applicant because he had a misdemeanor arrest for carrying a gun was discrimination.[93] The court found that the institution failed in its burden to support the allegation that refusal to hire because of the arrest record was a business necessity. The Fifth Circuit Court affirmed the decision that a black police officer was not discriminated against or denied a position as an associate vice-president of administration because of his race or protected speech.[94]

Nontenured Faculty

First Amendment Speech. The question of whether a librarian was discharged because of protected speech was before the court in a Virginia case.[95] The plaintiff alleged that the filing of a grievance at the institution and his testimony before the Virginia General Assembly about misappropriation of state funds were the basis for his removal. The court found that the grievance about his employment status where his contract had been reduced from three years to one year prior to his testimony before the legislature was not a public concern implicating protected speech under the amendment. Furthermore, the court found that the plaintiff failed to establish a causal link between his protected speech, testimony before the general assembly, and his removal. This finding is further buttressed by the timing of the majority of the disciplinary actions taken against the employee prior to his testimony.

Nonrenewal Procedures. The issues of the nonrenewal of a tenure track faculty member or the denial of tenure were vigorously litigated in the past year. The issues include questions of contractual rights in either nonrenewal or tenure denial, constitutional issues emanating from the

92. Carter v. Bennett, 840 F.2d 63 (D.C. Cir. 1988).
93. Board of Trustees of S. Ill. Univ. v. Knight, 516 N.E.2d 991 (Ill. Ct. App. 1987).
94. Ferguson v. Hill, 846 F.2d 20 (5th Cir. 1988).
95. Leachman v. Rectors and Visitors of Univ. of Va., 691 F. Supp. 961 (W.D. Va. 1988).

denial or nonrenewal action, access to materials or deliberations in the tenure review process, and liability issues.

In the nonrenewal of a probationary faculty member, one issue is the authority to make such decisions. In an Illinois case, the court found that the statutory authority of the board to dismiss nontenured faculty was a nondelegated power which could not be superceded by a collective bargaining agreement.[96] Another issue is the contractual obligations possessed by the institution. A District of Columbia court ruled that the plaintiff had shown a reasonable expectation of re-employment under a three-year tenure track contract when the institution failed to meet its own deadline for notification of nonrenewal.[97] In another case, the First Circuit Court affirmed a lower court decision that the institution, after acquiring a college, was not obligated to honor the notification provisions of the previous institution and notification was timely as found by a jury trial.[98]

Questions of contractual obligations were before a New York court which found that a faculty member's contract was not breached when his contract was not renewed.[99] A Louisiana court found that an unsubstantiated verbal promise of tenure would not supercede a contract where no guarantee of the award of tenure was implied or expressed.[100] A court ruled that an institution could rescind a contract without a hearing when it found out that the faculty member had held concurrent full-time positions at two universities.[101] In Georgia, a court found that a contract was not breached in the denial of tenure nor could the denial of access to data after the denial decision result in a damage award.[102] The Fifth Circuit Court found that the letter sent as a written response to annual evaluation was too far removed to be a pretermination notice the next year.[103] Also, the court found that plaintiff's speech did not involve matters of public concern and thus did not fall within the protection of the first amendment.

The procedures in the review and denial of tenure were also before the courts. In an unusual case, a faculty member applied for and was reviewed for both promotion to assistant professor and tenure but was denied both.[104] The form sent to award her a terminal year contract

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96. Board of Trustees of Community College Dist. No. 508 v. Cook County College Teachers Union, 522 N.E.2d 93 (Ill. App. Ct. 1987).

97. Howard Univ. v. Best, 547 A.2d 144 (D.C. 1988).

98. Aggarwal v. Ponce School of Medicine, 837 F.2d 17 (1st Cir. 1988).

99. Rosen v. Vassar College, 525 N.Y.S.2d 399 (App. Div. 1988).

100. Gottlieb v. Tulane Univ. of La., 529 So. 2d 128 (La. Ct. App. 1988); *see* The Yearbook of Education Law 1988 at 239, Gottlieb v. Tulane Univ. of La., 809 F.2d 278 (5th Cir. 1987).

101. Morgan v. American Univ., 534 A.2d 323 (D.C. 1987).

102. Moffie v. Oglethorpe Univ., Inc., 367 S.E.2d 112 (Ga. Ct. App. 1988).

103. Page v. DeLaune, 837 F.2d 233 (5th Cir. 1988).

104. House v. University of Cent. Ark., 684 F. Supp. 222 (E.D. Ark. 1988).

contained a check after the words "tenure-track contract" instead of "terminal contract." The plaintiff alleged that this error gave her defacto tenure. The board of trustees met several times over this matter and eventually changed its vote and denied tenure. The court ruled that the handbook was clear that this was a terminal contract and plaintiff acknowledged that she knew the misplaced "X" was an error. Furthermore, the court ruled that statements made to the press involving public meetings of the board did not implicate a liberty interest requiring due process. In a New York case, the court ruled that the chancellor's failure to forward several faculty member's tenure review materials to the board was error.[105] Clearly, state law gives the board the power to grant tenure and does not vest any discretion beyond making a recommendation to the chancellor.

Several cases involved allegations of the existence of a property right or a liberty interest requiring due process in the denial of tenure. The Fifth Circuit Court found that the faculty member had no property interest or liberty interest requiring due process in the denial of tenure and that the institution provided valid reasons other than the faculty member's public statements about the schools policy of disposal of laboratory animals.[106] In a South Dakota case, a federal court reached similar conclusions of the due process issue but found that sufficient facts remained unresolved to require the first amendment claim to be tried.[107]

Access to materials and deliberations were also before the court. In two Pennsylvania cases, one involving a "state related" institution[108] and another involving a private institution,[109] the court found that materials prepared by the various levels of peer review within the institution's tenure review process are performance evaluations, not letters of reference, and should be subject to employee inspection under the state labor laws.[110] In Minnesota, a federal court granted a faculty member the right to review the tenure and personnel files of all faculty members of the college in a case alleging sex discrimination under title VII.[111] The Third Circuit Court refused to dismiss an order by the district court to give access to peer

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105. Faculty of City Univ. of N.Y. School at Queens College v. Murphy, 531 N.Y.S.2d 665 (Sup. Ct. 1988).

106. Staheli v. University of Miss., 854 F.2d 121 (5th Cir. 1988); *see* The Yearbook of School Law 1986 at 247, Staheli v. University of Miss., 621 F. Supp. 449 (D. Miss. 1985).

107. Beville v. South Dakota Bd. of Regents, 687 F. Supp. 464 (D.S.D. 1988), *see also* Beville v. University of S.D., 420 N.W.2d 9 (S.D. 1988).

108. Pennsylvania State Univ. v. Commonwealth, Dep't of Labor and Indus., 536 A.2d 852 (Pa. Commw. Ct. 1988).

109. Lafayette College v. Commonwealth, Dep't of Labor & Indus., 546 A.2d 126 (Pa. Commw. Ct. 1988).

110. Personnel Files Act, 43 Pa. Con. Stat. Ann. §§ 1321, 1322 (1978).

111. Orbovich v. Macalester College, 119 F.R.D. 411 (D. Minn. 1988).

review records in a title VII sex discrimination claim.[112] The defendant institution was unsuccessful in arguing that the case it filed in the District of Columbia took precedence under the court's "first filed rules." However, a faculty member filing a wrongful dismissal charge after tenure was denied was unable to gain access to peer review materials in an action in a Vermont court.[113]

A number of cases involved allegations of violations of constitutional or civil rights in the denial of tenure. For example, the Fifth Circuit Court found that a faculty member's equal protection guarantees were not violated when his lenient grading policy became an important factor in the tenure denial decision when grading policies were not considered in the decisions involving other probationary faculty under review.[114] In Idaho, a faculty member was able to show that speech about grades awarded in a seminar was a matter of public concern and an impermissible factor in the denial of tenure decision.[115] The court reinstated the faculty member and remanded the case for a determination of damages and attorneys' fees. In another case, a faculty member who was denied tenure filed four counts against the institution. The first three represented breach of contract and misrepresentation claims while the fourth count involved allegations of a decision emanating from protected speech.[116] The circuit court reversed the dismissal of the first three counts finding that the interrelated nature of the four counts mandated trial on all four counts not just the fourth count.

In claims of sex discrimination in the denial of tenure, a federal court ruled that after a jury verdict in favor of the faculty member, the plaintiff was entitled to reinstatement as a tenured associate professor and awarded damages for emotional distress under state law.[117] In a Pennsylvania case, a private university hired a black faculty member with the written understanding that part of his task was to help the institution build strong public relations with the community. The faculty committee recommended tenure and rated his public service and teaching as outstanding and his scholarship as satisfactory. However, the department head and those above him in the process gave no outstanding ratings and below satisfactory in research. The court found that from the evidence in the 1981 claim, the jury could deduce that the denial of tenure due to low ratings was a pretext for racial discrimination.[118] Noting that his job description required that he emphasize public relations and that his record in this area was clearly outstanding, the court found

112. EEOC v. University of Pa., 850 F.2d 969 (3d Cir. 1988).
113. Cockrell v. Middlebury College, 536 A.2d 547 (Vt. 1987).
114. Levi v. University of Tex. at San Antonio, 840 F.2d 277 (5th Cir. 1988).
115. Hale v. Walsh, 747 P.2d 1288 (Idaho Ct. App. 1987).
116. Spiegel v. Trustees of Tufts College, 843 F.2d 38 (1st Cir. 1988).
117. Brown v. Trustees of Boston Univ., 674 F. Supp. 393 (Mass. Dist. Ct. 1987).
118. Roebuck v. Drexel Univ., 852 F.2d 715 (3d Cir. 1988).

that the department head and those above him devalued those items and, logically, the jury could assume it was because of the plaintiff's race. The court reversed the lower court decision which had granted judgment in favor of the defendant institution on the title VII claim.

Similarly, a Delaware faculty member was able to show that failure to grant him tenure was a pretext for discrimination on national origin.[119] Pretext existed because the reason for denial was an attempt to upgrade the academic program, but the new job was advertised with the same qualifications possessed by the plaintiff. A state case reached similar pretextual conclusions.[120]

Part-time Faculty. A part-time faculty case involved the coverage of retirement benefits after the adjunct faculty member's death.[121] The faculty member had been employed on a regular basis by the institution and was under contract to teach the following summer with a commitment to teach in the fall. Just prior to the commencement of summer session he notified the department head that illness would prevent his teaching that summer and was told he would be offered a position for the fall. Upon his death in late summer the Public Employee Retirement Board ruled that since he was not employed and had failed to follow the conversion procedures, his widow would not qualify for death benefits. The court ruled that he was active in the retirement system, that he was a regular part-time employee, and that the proper notice of the conversion requirements had not been forwarded. The court ordered the payment of death benefits.

Tenured Faculty

Termination for Cause. Issues surrounding termination of tenured faculty for cause include the question of the existence of a tenure contract, due process requirements, claims that the termination was a violation of a constitutionally protected right, and the types of cause resulting in the termination. The question of the existence of tenure was before the Eleventh Circuit Court in a decision involving the transfer by the state legislature of the community college to the authority of the state system.[122] The court remanded the case, finding that the suit was not barred by the eleventh amendment.

Several cases involved the nature of contract. In a Florida case, a state court found that the faculty member was dismissed for failure to meet the terms of a mandatory disability leave agreement executed by both the

119. Obemeng v. Delaware State College, 676 F. Supp. 65 (D. Del. 1988).
120. *In re* Brantley, 518 N.E.2d 602 (Ohio Ct. App. 1987).
121. Estate of Hagel v. Board of Trustees, 543 A.2d 1010 (N.J. Super. Ct. 1988).
122. Ezzell v. Board of Regents of Univ. Sys. of Ga., 838 F.2d 1569 (11th Cir. 1988).

plaintiff and his attorney.[123] Court action was time barred when the plaintiff failed to request a hearing within twenty-one days of notification of termination sent to his attorney. The Sixth Circuit Court found that a faculty member who resigned from the institution was not denied a property right when he was subsequently denied professor emeritus status.[124] Another court found that a faculty member had "constructively resigned" when she accepted a judgeship.[125] The refusal to reinstate the professor did not violate a property right or the first amendment. A District of Columbia faculty member was unable to successfully sustain a breach of contract claim over his suspension, three year grievance procedure, and subsequent reinstatement.[126]

A number of cases involved questions of due process. In Wisconsin, a faculty member who no longer could attract students to his class was reassigned to other administrative tasks, asked for a hearing, refused to resign, and was terminated when he failed to show up for work as an administrator.[127] The court found he was entitled to due process but was no longer employable as a faculty member because of illness. Damages should only be in the form of pay from the day he was terminated to the day final dismissal would have taken place had the proscribed procedures been followed.

Claims involving constitutional violations in termination of tenured faculty were litigated. In Washington, the court found that speech by the plaintiff, a dismissed tenured faculty member, was protected under the first amendment. However, the court found that the institution had a permissible reason to dismiss the plaintiff. His obscene language and excessive criticism of fellow faculty, creating an untenable situation in the work place, was not speech on matters of public concern, but rather employee speech. The Eleventh Circuit Court affirmed a remanded district court finding[128] that the plaintiff's disputes with administrators, viewed as disruptive of the work environment, were not matters of public concern.[129] However, evidence of sexual harassment of students not used at the termination hearings was inadmissible later in court as the rational for the dismissal. In another case, a medical college faculty member, facing charges of malpractice over the death of four patients and findings of negligence in patient care and resident supervision by internal and

123. Woodard v. Florida State Univ., 518 So. 2d 336 (Fla. Dist. Ct. App. 1988).

124. Samad v. Jenkins, 845 F.2d 660 (6th Cir. 1988).

125. Gonzalez de Brindle v. Reoyo, 686 F. Supp. 370 (D.P.R. 1988).

126. Press v. Howard Univ., 540 A.2d 733 (D.C. 1988).

127. Patterson v. Portch, 853 F.2d 1399 (7th Cir. 1988); *see* The Yearbook of School Law 1985 at 322, Patterson v. Board of Regents of Univ. of Wis. Sys., 350 N.W.2d 612 (Wis. Ct. App. 1984).

128. *See* The Yearbook of School Law 1986 at 250, Harden v. Adams, 760 F.2d 1158 (11th Cir. 1985).

129. Harden v. Adams, 841 F.2d 1091 (11th Cir. 1988).

external panels, was asked to resign, which he did.[130] The court found that the resignation was not voluntary thereby rendering it a deprivation of property. A local newspaper contested the institution's attempt to have the records in this case sealed. The circuit court ordered the lower court to hold a hearing before sealing the records.[131]

In a case involving a decade of agitation by a faculty member of the denial of an NSF grant proposal, the court ruled that the plaintiff's public speech destroyed the harmony and working relationship of the institution and clearly became disruptive.[132] The saga of a decade of pursuit of the issue through the hierarchy of the university to the state police, the Federal Bureau of Investigation, the governor of the state, and a United States senator is replete with threats, harassment, and charges of criminal conduct bordering on defamation. The termination after what the court called a comprehensive due process procedure was initiated through a petition by the faculty of the college.

Another case involved a faculty member who was dismissed after a hearing committee found him guilty of sexual harassment of female students and the courts affirmed that the plaintiff's constitutional rights were not violated in the termination process.[133] The faculty member's widow brought a title VII claim which was rejected by the court.[134] They found that the issue raised, charges of sexual harassment alleged to be pretext for discrimination based on sex, had been resolved in the previous litigation filed under sections 1981 and 1983. A sports director and tenured faculty member was unsuccessful in alleging due process violations in his termination as either an administrator or a tenured faculty member.[135] A university audit found that he had used university funds and clerical support to operate several private business ventures and misused the name of the institution. In North Carolina, a faculty member was unsuccessful in alleging that the evidence before the hearing committee was inadequate to support the charges of sexual harassment of female students in his courses.[136]

Denial of Employee Privileges. Tenured faculty member privileges included issues such as temporary suspension, denial of promotion, censorship of classroom activity, and assignment of facilities. Two cases involved suspension for a period of time resulting from unacceptable

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130. Stone v. University of Md. Medical Sys. Corp., 855 F.2d 167 (4th Cir. 1988).
131. *Id.* at 178.
132. Fong v. Purdue Univ., 692 F. Supp. 930 (N.D. Ind. 1988).
133. *See* The Yearbook of School Law 1985 at 321, Levitt v. Monroe, 590 F. Supp. 902 (W.D. Tex. 1984); *see* The Yearbook of School Law 1986 at 251, Levitt v. University of Tex. at El Paso, 759 F.2d 1224 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 599 (1985).
134. Levitt v. University of Tex. at El Paso, 847 F.2d 221 (5th Cir. 1988).
135. Mueller v. Regents of Univ. of Minn., 855 F.2d 555 (8th Cir. 1988).
136. *In re* Kozy, 371 S.E.2d 778 (N.C. Ct. App. 1988).

behavior. In a case on appeal, the Second Circuit Court found that the due process rights of the faculty member were guaranteed through the college grievance procedure when he was suspended for two weeks for refusing to allow an evaluation team access to his class after students complained about his teaching.[137] The court also ruled that the dismissal of his first amendment claim by the lower court was an error and remanded the case for a hearing on the merits. In an Arizona case, the court found that the contract had not been breached when a faculty member was suspended for six months after a hearing tribunal found him guilty of serving cookies laced with marijuana at a class activity off campus.[138]

Several cases involved the denial of promotion. In one case, a faculty member alleged that his promotion was denied because of his public pronouncements on matters of public concern. Some of his pronouncements over the years in an ongoing dialog with the president of the institution were matters of public concern. Therefore, the district court errored in granting summary judgment to the defendant institution.[139] In another case, a faculty member denied promotion brought claims of defamation emanating from the contents of a memo from the department head.[140] The court found that the opinions in the memo were the result of the evaluation process to which the faculty member had opened herself in the application for promotion and were protected by the first amendment.

Free speech violations were alleged in the transfer of several professors to other departments. The court found that while the speech of the professors over the quality of the department were matters of public concern, they had become significantly disruptive and could be viewed as going to the very root of the problems of the department.[141] The court also found that the plaintiffs had no property right in the departmental assignment. Another case involved an attempt to censure a professor's classroom speech.[142] The circuit court dismissed the defendant's appeal which argued that a qualified immunity should have resulted in the district court grant of a summary judgment in favor of the institution.[143]

Several cases involved the allocation of resources. A Connecticut court found that a former dean did not have a property right to a specific salary and tenure as a professor because others had received that offer

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137. Narumanchi v. Board of Trustees of Conn. State Univ., 850 F.2d 70 (2d Cir. 1988).
138. Barrow v. Arizona Bd. of Regents, 761 P.2d 145 (Ariz. Ct. App. 1988).
139. Kurtz v. Vickrey, 855 F.2d 723 (11th Cir. 1988).
140. Gernander v. Winona State Univ., 428 N.W.2d 473 (Minn. Ct. App. 1988).
141. Maples v. Martin, 858 F.2d 1546 (11th Cir. 1988).
142. Mahoney v. Hankin, 844 F.2d 64 (2d Cir. 1988).
143. *See* The Yearbook of School Law 1985 at 325, Mahoney v. Hankin, 593 F. Supp. 1171 (S.D.N.Y. 1984).

when they stepped down as dean.[144] In an Illinois case, a faculty member at a private university failed to establish rights to the allocation of laboratory space for his cancer research.[145]

Termination Due to Financial Exigency or Program Elimination. A Washington court found that the institution followed the procedures spelled out in institutional documents when the board of regents voted to close a program and the two tenured faculty members were given termination notices, a hearing before a committee, and an appeal to a higher authority.[146] However, a Nebraska court found that an institution failed to meet its contractual obligations to a terminated faculty member when it failed to grant the request for a hearing.[147]

A California faculty member without tenure who headed two grant programs funded by the federal government was terminated by a vote of the department to phase the two programs out over the next two years.[148] The court found that the institution and its chancellor had acted arbitrarily when it ignored the findings of a hearing agent and continued to uphold the termination action.

Collective Bargaining

A long-standing litigation[149] between the Regents of the University of California and the state labor relations board was resolved by the Supreme Court.[150] The court found that the institution was required by Private Express Statute[151] to allow only the distribution of mail by their own mail service on matters which are "related" to the "current business" of the institution. The court found that the mail from the union to employees of the state colleges and universities about organizing a collective bargaining unit was a matter related to the union's current business and not the business of the state higher education system. The institution was correct in denying the union access to its mail services under the federal law.

The question of the jurisdiction of labor relations statutes over

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144. Barde v. Board of Trustees of Regional Community Colleges, 539 A.2d 1000 (Ct. 1988).

145. Williams v. Northwestern Univ., 523 N.E.2d 1045 (Ill. App. Ct. 1988).

146. Christensen v. Terrell, 754 P.2d 1009 (Wash. Ct. App. 1988).

147. Van Fossen v. Board of Governor, Cent. Technical Community College Area, 423 N.W.2d 458 (Neb. 1988).

148. Apte v. Regents of Univ. of Cal., 244 Cal. Rptr. 312 (Ct. App. 1988).

149. Regents of Univ. of Cal. v. Public Employment Relations Bd., 227 Cal. Rpt. 57 (Ct. App. 1986); note probable jurisdiction, see The Yearbook of School Law 1987 at 242, Regents of Univ. of Cal. v. Public Employment Relations Bd., 107 S. Ct. 3236 (1987).

150. Regents of Univ. of Cal. v. Public Employment Relations Bd., 108 S. Ct. 1404 (1988).

151. Private Express Statute, 18 U.S.C. §§ 1693-1699 (1978), 39 U.S.C. §§ 601-606 (1978), see exceptions 39 CFR § 310.3(C) (1987).

various institutions was before the courts. A Pennsylvania court found that the state system of higher education, the governing board for the fourteen public comprehensive colleges, did not fall under the provisions of the statutes which defined the jurisdiction of the state labor relations board.[152] In Ohio, a court found that the state labor relations board had no jurisdiction over unfair labor practices which occurred prior to the effective date of statutes which defined unfair practices.[153]

Questions surrounding the organization of employees into a collective bargaining unit were also before the courts. In New York, the court found that an employee could not claim retaliation for attempting to organize employees when discussions about employee issues fell short of the level of activity required to show a concerted effort to organize.[154]

In a bargaining unit designation case, the Fifth Circuit Court found that the faculty at Boston University were managerial employees not eligible to organize a bargaining unit. In a case on remand from the Supreme Court,[155] the court relied on the analysis of the *Yeshiva* case[156] and found that faculty decision-making authority made them managers.[157]

Two other cases involved membership in the bargaining unit. In Oregon, the court found that a bargaining unit which included research associates and assistants, instructors, and lecturers, but excluded tenure track faculty, could not be certified under statutory provisions defining antifragmentation criteria.[158] In Illinois, the court ruled that the directors of research centers and institutes were managerial employees excluded from the bargaining unit.[159]

Charges of unfair labor practices were also before the courts. In Connecticut, a court found that the termination of an employee at the end of the probationary period was a nongrievable managerial prerogative.[160] A New Jersey court found that the setting of the mandatory retirement age at seventy was a nonnegotiable managerial preroga-

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152. Conference of Pa. College of Police Officers v. Commonwealth Labor Relations Bd., 537 A.2d 108 (Pa. Commw. Ct. 1988).

153. State Employment Relations Bd. v. Ohio State Univ., 520 N.E.2d 597 (Ohio Ct. App. 1987).

154. Rosen v. Public Employment Relations Bd., 530 N.Y.S.2d 534 (N.Y. 1988); *see* The Yearbook of Education Law 1988 at 242, Rosen v. Public Employment Relations Bd., 510 N.Y.S.2d 180 (App. Div. 1986).

155. Trustees of Boston Univ. v. NLRB, 445 U.S. 912 (1980).

156. NLRB v. Yeshiva Univ., 444 U.S. 672 (1980).

157. Boston Univ. Chapter AAUP v. NLRB, 835 F.2d 399 (1st Cir. 1987).

158. University of Or. Chapter, AFT v. University of Or., 759 P.2d 1112 (Or. Ct. App. 1988).

159. Board of Regents of Regency Univs. Sys. v. Illinois Educ. Labor Relations Bd., 520 N.E.2d 1150 (Ill. App. Ct. 1988).

160. State v. AFSCME, Council 4, 537 A.2d 517 (Conn. Ct. App. 1988).

tive.[161] However, the manner used to waive the age retirement provisions was a negotiable matter. In Vermont, the court found that the president's attempt to bring equity to faculty work loads by issuing workload guidelines which "excessively" increased the workloads of some faculty was an unfair labor practice, absent negotiation with the collective bargaining unit.[162]

However, an Oregon court found that it was not an unfair labor practice to cease bargaining with a bargaining organization because of an impending election or to refuse to accept the unratified agreement of the previous bargaining organization defeated in the election.[163]

Grievance procedures were also the subject of litigation. In the discharge of an employee, the court found the principal of *res judicata* applied where the merit board hearing officer found that the institution had valid reasons for the termination.[164] The state labor relations board could not also hear the grievance even when the institution advised the plaintiff that the merit board was the only available option and the plaintiff voluntarily chose that option. In another case, a state court ruled that state courts could not entertain the filing of a claim where proper administrative remedies (i.e., a hearing of the dispute by the state labor relations board, had not been exhausted.[165]

Arbitration issues were also litigated this year. Among the issues was the question of when the parties could go to arbitration. A Massachusetts court found that the parties could not go to arbitration during the term of an existing collective bargaining agreement.[166] In a New York case, the court affirmed an arbitrator's decision, even though he used a different reasoning to reach the same result as another arbitrator.[167]

Administrators and Staff

Claims in the termination of administrators and staff included questions of jurisdiction, constitutional rights involving property, speech, or discrimination, claims of breach of contract, and violation of state laws. An Idaho case involved the question of court jurisdiction in a dispute over

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161. University of Medicine and Dentistry of N.J. v. University of Medicine, Council AAUP, 538 A.2d 840 (N.J. Super. Ct. App. Dist. 1988).

162. Vermont State College Faculty Fed'n v. Vermont State College, 547 A.2d 1340 (Vt. 1988).

163. AFSCME Council 75 v. Oregon Health Sciences Univ., 755 P.2d 141 (Or. Ct. App. 1988).

164. Board of Governors of State Colleges and Univs. *ex rel.* Northeastern Ill. Univ. v. Illinois Educ. Labor Relations Bd., 524 N.E.2d 758 (Ill. App. Ct. 1988).

165. South Dakota Bd. of Regents v. Heege, 428 N.W.2d 535 (S.D. 1988).

166. Massachusetts Community College Council MTA/NEA v. Labor Relations Comm'n, 522 N.E.2d 416 (Mass. 1988).

167. Rockland Community College Fed'n of Teachers, Local 1871 v. Trustees of Rockland Community College, 531 N.Y.S.2d 117 (App. Div. 1988).

the termination of a university employee. The state attempted to move the case from state court to federal court. The court found that eleventh amendment immunity and state statutes authorizing suit in state court to recover damages from the state necessitated the granting of the plaintiff's request to send the case back to state court.[168] In Colorado, the court found that the state personnel board does have authority to review the personnel director's determination on approval or rejection of a state service contract.[169]

The violation of constitutional rights in the termination of administrators was also before the court. In the lead case in this section, the court found that the institution possessed a "qualified immunity" from prosecution in a situation where the plaintiff is unable to substantiate constitutional claims in order to surmount the immunity defense.[170] Removal of a faculty member from the department head position was an administrative "discretionary function." A terminated community college dean could not sustain a constitutional claim simply because the institution did not follow the spelled out procedures for which state remedies are available.[171]

A number of cases raised the issue of the existence of a property right requiring due process. In New Mexico, the court found that the nonrenewal of a business manager's contract was not the denial of a property right.[172] In an Indiana case, the court found that while the plaintiff had no property right emanating from the institution's policy manual, material facts existed to warrant trial on whether a property right was acquired through university employment practices.[173] A surgeon's due process was provided during his request for reinstatement to the university hospital staff.[174] The hearing committee did not hear testimony on the surgeon's behalf, did not issue a written decision, and did not require the surgeon be represented by counsel.

Cases involving allegations of first amendment violations in terminations were also before the courts. In a Pennsylvania case, a summary judgment was granted on a discrimination claim but denied on a first amendment claim.[175] Material issues exist on the academic advisors' claim that they were dismissed for their public statements on discriminatory practices at the institution. Radio station programers were dismissed when they refused to stop reporting on a housing development and a political

168. Mazur v. Hymas, 678 F. Supp. 1473 (D. Idaho 1988).
169. University of S. Colo. v. State Personnel Bd. of Colo., 759 P.2d 865 (Colo. Ct. App. 1988).
170. Garvie v. Jackson, 845 F.2d 647 (6th Cir. 1988).
171. Fields v. Durham, 856 F.2d 655 (4th Cir. 1988).
172. Graff v. Glennen, 748 P.2d 511 (N.M. 1988).
173. Shannon v. Bepko, 684 F. Supp. 1465 (S.D. Ind. 1988).
174. Yashon v. Hunt, 825 F.2d 1016 (6th Cir. 1987).
175. Stokes v. Trustees of Temple Univ., 683 F. Supp. 498 (E.D. Pa. 1988).

campaign in which the college had an interest.[176] The court, citing an Alabama decision,[177] ruled that the radio station had the prerogative to set its own editorial policy and had not violated the first amendment rights of the program director.

In another case, the court found that while the pronouncements of an athletic director were matters of public concern, they were not protected when they became disruptive to the president's ability to maintain harmony within the college environment.[178] A Texas federal district court failed to grant a summary judgment in a termination case where first amendment rights, among others, may have been violated.[179] Material facts requiring adjudication existed in the termination of a health center clerk who sent memos to her supervisors identifying payroll irregularities. The District of Columbia Circuit Court found that an athletic director's statements about improprieties in the athletic program were matters of public concern but the "government's interest in efficient administration outweighed Hall's interest in speaking."[180] Finally, the president of the institution who publicly disclosed illegal activities of the business school dean and the chair of the board of trustees, was an at will employee and could be terminated for perceived deficiencies in leadership necessary to carry the school through troubled times.[181]

A college painter alleged that he was the victim of racial discrimination during his employment and sued for damages.[182] On appeal the court held that the employee was eligible for damages, activities of co-workers were discriminatory, and inactions of the supervisor raised additional allegations of racial discrimination. A police officer who refused to take a polygraph test sued alleging that protections against self-incrimination were violated.[183] The court remanded the case on the self-incrimination issue.

Claims of a breach of contract were alleged in several termination cases. In Massachusetts, the court found that the terminated director of a department was discharged for valid reasons.[184] Termination for strained relationships with some of the faculty did not breach the employment

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176. Schneider v. Indian River Community College Found., Inc., 684 F. Supp. 283 (S.D. Fla. 1987).

177. Muir v. Alabama Educ. Television Comm'n, 688 F.2d 1033 (5th Cir. 1982).

178. Berg v. Hunter, 854 F.2d 238 (7th Cir. 1988).

179. Schweitzer v. University of Tex. Health Center at Tyler, 688 F. Supp. 278 (E.D. Tex. 1988).

180. Hall v. Ford, 856 F.2d 255, 259 (D.C. Cir. 1988).

181. Rinehimer v. Luzerne County Community College, 539 A.2d 1298 (Pa. Super. Ct. 1988).

182. Jones v. Los Angeles Community College Dist., 244 Cal. Rptr. 37 (Ct. App. 1988).

183. Truesdale v. University of N.C., 371 S.E.2d 503 (N.C. Ct. App. 1988).

184. Klein v. President and Fellows of Harvard College, 517 N.E.2d 167 (Mass. App. Ct. 1987).

contract. Termination of an employee serving "at will" did not breach an employment contract.[185] In Maryland, a terminated development officer could not maintain a claim of constructive and wrongful discharge when the president asked for and received his resignation but later gave him an opportunity to rescind it.[186] In Minnesota, a tenured professor's contract was not breached when the institution failed to appoint him department chair.[187] However, in Arizona, the court found that a covenant to employ the head basketball coach for four years was breached when he was terminated after the first year.[188] In another case, the matter was remanded to the jury for a determination of whether extenuating circumstances existed so as to allow the institution to take action not consistent with its procedures.[189] A former dean, who executed a consent decree when he was transferred to another administrative position, received fair and equitable salary increases consistent with policy and in conformity to the consent decree according to the court.[190]

Several cases concerning termination involve state laws and statutes. The court found that a custodian's dismissal for misconduct did not violate the state civil service laws.[191] In another case, the court found that the employment commission's decision was arbitrary and capricious in rejecting the appeal of a full-time employee not hired for a university personnel office position.[192] The court found that state law required that positions, when practical and feasible, should be filed by qualified, full-time employees. A police officer who claimed that the institution criticized him for making arrests on campus, was unable to support a claim of termination in violation of the Whistleblowers' Protection Act.[193]

Several termination cases resulted in the award of damages. In one case, the court reduced the amount of the damages but affirmed the award for slanderous activity emanating from statements made to a prospective employee of the plaintiff.[194] In Colorado, the court reversed the award of back-pay but ordered the employee reinstated in a wrongful termination.[195] An Oregon court affirmed the back-pay award and added

185. Gomez v. Trustees of Harvard Univ., 676 F. Supp. 13 (D.D.C. 1987).
186. Board of Trustees of State Univs. and Colleges v. Fineran, 541 A.2d 170 (Md. Ct. Spec. App. 1988).
187. Goodkind v. University of Minn., 417 N.W.2d 636 (Minn. 1988).
188. Lindsey v. University of Ariz., 754 P.2d 1152 (Ariz. Ct. App. 1987).
189. Goldhor v. Hampshire College, 521 N.E.2d 1381 (Mass. App. Ct. 1988).
190. Hanson v. Hearn, 521 So. 2d 953 (Ala. 1988).
191. Johnson v. Whitfield, 521 So. 2d 641 (La. Ct. App. 1988).
192. Joyce v. Winston-Salem State Univ., 370 S.E.2d 866 (N.C. Ct. App. 1988).
193. Dickson v. Oakland Univ., 429 N.W.2d 640 (Mich. Ct. App. 1988); Whistleblowers' Protection Act, Mich. C.L. §§ 15.361 *et seq.* (1976).
194. St. Clair v. Trustees of Boston Univ., 521 N.E.2d 1044 (Mass. App. Ct. 1988).
195. Beardsley v. Colorado State Univ., 746 P.2d 1350 (Colo. Ct. App. 1987).

the award of attorney's fees in the wrongful termination of a State Board of Higher Education employee.[196]

Denial of Employee Benefits. Cases before the courts included denial of benefits to employees involving benefits such as retirement, summer employment, and unemployment compensation. The state passed a bill exempting certain income from the calculation of the employer's contribution for college teachers to the state retirement system. The governor vetoed that part of the legislation based on the wording in the bill, declaring an emergency. Oregon taxpayers brought suit alleging that a governor's veto was invalid and, therefore, asked the court to stop the state's contributions to the retirement system under the old formula.[197] The court ruled that the veto power of the governor covered only the emergency provisions within the bill and did not extend to the provisions in question. The legislation, therefore, was enacted and must be used to determine the employer contribution. In another state, the court found that professional university employees were not eligible for longevity pay awarded for extended employment with the state.[198]

A number of cases dealt with the denial of benefits to specific individuals. A music teacher was not successful in his claim of rights violations because he was moved from an individual instruction mode of teaching piano to a classroom mode.[199] In another case, wages for a summer appointment were withheld when the faculty member refused to comply with an executed early retirement agreement by submitting his resignation.[200] The court ruled that summer appointments were not covered by the state's wage protection act and that the university had not breached the contract or good faith dealing by withholding part of the summer salary. In New York, the court affirmed the existence of a contract and found it had been breached when an employee's two-year appointment was rescinded.[201]

Questions surrounding unemployment compensation were also litigated. In Pennsylvania, a court found that the layoff of employees during the spring term did not constitute a layoff between terms as described by the statute and unemployment benefits were awarded.[202] However, an Oregon court denied an award of unemployment compensation to an employee not employed for the summer but with a reasonable assurance

196. Lofft v. State Bd. of Higher Educ., 750 P.2d 515 (Or. Ct. App. 1988).
197. Lipscomb v. State Bd. of Higher Educ., 753 P.2d 939 (Or. 1988).
198. Roberts v. State, 752 P.2d 221 (Nev. 1988).
199. Lewis v. Midwestern State Univ., 837 F.2d 197 (5th Cir. 1988).
200. Julian v. Montana State Univ., 747 P.2d 196 (Mont. 1987).
201. Merschrod v. Cornell Univ., 527 N.Y.S.2d 109 (App. Div. 1988).
202. Katz v. Commonwealth, Unemployment Compensation Bd. of Review, 540 A.2d 624 (Pa. Commw. Ct. 1988).

of re-employment in the fall term.[203] Other cases resulted in the denial of unemployment benefits.[204]

Sexual Harassment. The question of sexual harassment resulting in the termination of employees was before the courts. In New York, the court found that the evidence of the exploitation of two female employees under the terminated employee's supervision was sufficient evidence to justify the termination.[205] In South Carolina, the court found the university had no basis to stop the hearing of a grievance over a former employee's attempt to rescind a resignation after being confronted with allegations of sexual harassment.[206] However, a Minnesota court found that the letters and statements of affection made by one employee to another employee whom he no longer supervised, which immediately ceased upon request, were not sexual harassment, but rather an attempt to establish a personal relationship.[207] The court ruled that the employee would be eligible for unemployment compensation.

Finally, a New Jersey case involving sexual harassment charges brought against a doctor and a hospital saw the denial of summary judgments in both state[208] and federal[209] courts. The plaintiff became a patient for a psychiatrist for whom she worked as a secretary and commenced a romantic relationship with the doctor. Her claim alleged sexual harassment and retaliation in her termination after the expiration of her medical leave and the rejection of a position offered to her.

STUDENTS

The student litigation is diverse. Financial aid cases involving loan default or bankruptcy continue to be substantial in number. Cases involving child support for college in divorce were also litigated. First amendment freedom of speech, religion, association, and commercial speech rights continue to be litigated by students.

Admissions

A law school applicant appealed the denial of his enrollment in three consecutive calendar years.[210] In previous complaints, the plaintiff al-

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203. Employment Div., Dep't of Human Resources v. Epstein, 752 P.2d 1295 (Or. Ct. App. 1988).

204. *In re* Alexander, 522 N.Y.S.2d 988 (App. Div. 1988); *In re* Council, 523 N.Y.S.2d 212 (App. Div. 1987); Hollenshev. Iowa Dep't of Job Servs., 418 N.W.2d 77 (Iowa Ct. App. 1987).

205. Crookston v. Brown, 528 N.Y.S.2d 908 (App. Div. 1988).

206. Medical Univ. of S.C. v. Taylor, 362 S.E.2d 881 (S.C. Ct. App. 1987).

207. Gradine v. College of St. Scholastica, 426 N.W.2d 459 (Minn. Ct. App. 1988).

208. Fuchilla v. Layman, 537 A.2d 652 (N.J. 1988).

209. Fuchilla v. Prockop, 682 F. Supp. 247 (D.N.J. 1987).

210. Hall v. State, 756 P.2d 1048 (Hawaii 1988).

leged the law school's admission policies and procedures, including its predomination program, discriminated against him, favoring a group of applicants of which he is not a member. Under the doctrine of *res judicata*, the court affirmed that the applicant's claims were barred by dismissal of prior federal action. The Deputy Attorney General had not libeled and defamed the applicant when he disclosed the applicant's score on the law school admission test in defense against the claim.

In the denial of a readmission decision of a black student suffering from alcoholism, the federal circuit court of appeals affirmed a lower court decision[211] that race was not a factor. The law school may consider academic prospects and sobriety in its decision to readmit. Furthermore, the court held that the student was not an otherwise qualified handicapped individual under the handicapped law.[212]

Nonresident Tuition

In a suit against a community college district, the United States sought to recover overpayments to a college under a Veterans Administration educational program.[213] Since the government's action was determined to be barred by the six year statute of limitations and, therefore, not substantially justified, the community college sought and received attorneys' fees and other sanctions against the government.[214]

Financial Aid

Cases involving the authority of the funding agency over constitutional financial aid programs were limited. A private university and individual defendants await trial for charges of conspiracy to commit theft, theft, and forgery as a result of allegedly making and submitting false documents to receive Basic Educational Opportunity Grant funds and other state scholarship and grant funds. A state court reversed a previous decision to dismiss the forgery charges, determined that the corporation was properly indicted for forgery, and dismissed an appeal from the state to reverse the lower court order to join the theft and conspiracy charges.[215]

In Kentucky, a junior college, participating in the Pell Grant Program and other federal campus-based federal financial aid programs, allegedly failed consistently to abide by all regulations and program requirements.

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211. *See* The Yearbook of Education Law 1988 at 248, Anderson v. University of Wis., 665 F. Supp. 1372 (W.D. Wis. 1987).

212. Anderson v. University of Wis., 841 F.2d 737 (7th Cir. 1988).

213. *See* The Yearbook of Education Law 1988 at 253, United States v. Gavilan Joint Community College Dist., 662 F. Supp. 309 (N.D. Cal. 1986).

214. United States v. Gavilan Joint Community College Dist., 849 F.2d 1246 (9th Cir. 1988).

215. People v. East-West Univ., Inc., 516 N.E.2d 4882 (Ill. App. Ct. 1987).

The Department of Education transferred the college to a reimbursement plan rather than the advance plan in which the institution may withdraw requested funds as needed. The college challenged the transferral of payment method for the financial aid expenditures. The court determined that no statutory or constitutional violations occurred.[216]

In New York, the court dismissed an appeal by a recipient of vocational rehabilitation services.[217] The court upheld a tuition-funding cap instituted by the agency and affirmed that a counselor's verbal assurance of full-funding did not require the commission to provide full tuition. In Pennsylvania, the court affirmed that a full-time student was not eligible for cash and medical assistance unless he had participated in a federal program for dependent children for five years.[218] The student was allowed to receive food stamps. The AFDC benefits received by a student were canceled by a state department since her income resulting from an educational loan exceeded the maximum limit.[219] The court upheld the calculations that the available money assisted with general living expenses.

A significant number of chapter seven bankruptcy cases were brought before the court. Educational loans were not discharged in several cases: the debtor had the present and future ability to meet his obligations without undue hardship;[220] a repayment was deferred until the debtor's daughter had graduated from college;[221] the bankruptcy petition was filed in an untimely manner and failed to list the educational loans;[222] a parent as endorser was responsible for repayment;[223] and an installment loan to pay off student loans was not discharged in the bankruptcy proceedings.[224] A debtor sought to revoke his own discharge in a chapter seven case since the discharge bars further discharge over five years. The court refused to grant relief.[225] In several cases, educational loans were discharged. A debtor's loan was discharged under a chapter thirteen bankruptcy case

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216. Bowling Green Jr. College v. United States Dep't of Educ., 687 F. Supp. 293 (W.D. Ky. 1988).

217. Fogel v. Perales, 522 N.Y.S.2d 283 (App. Div. 1987).

218. Yanushko v. Department of Pub. Welfare, 543 A.2d 1277 (Pa. Commw. Ct. 1988).

219. Wise v. Iowa Dep't of Human Servs., 424 N.W.2d 432 (Iowa 1988).

220. Connor v. Michigan Dep't of Treasury, 83 Bankr. 440 (Bankr. E.D. Mich. 1988); Childs v. Higher Educ. Assistance Found., 89 Bankr. 819 (Bankr. D. Neb. 1988); Courtney v. Gainer Bank, 79 Bankr. 1004 (Bankr. N.D. Ind. 1987); Garmerian v. Rhode Island Higher Educ. Assistance Auth., 81 Bankr. 4 (Bankr. D.R.I. 1987); Pendergrast v. Student Loan Servicing Center, 90 Bankr. 92 (Bankr. M.D. Pa. 1988).

221. Conner v. Illinois State Scholarship Comm'n, 89 Bankr. 744 (Bankr. N.D. Ill. 1988).

222. United States v. Putzi, 91 Bankr. 42 (Bankr. S.D. Ohio 1988).

223. Barth v. Wisconsin Higher Educ. Corp., 86 Bankr. 146 (Bankr. W.D. Wis. 1988).

224. Nicolay v. Georgia Higher Educ. Assistance Corp., 370 S.E.2d 660 (Ga. Ct. App. 1988).

225. *In re* Tuan Tan Dinh, 90 Bankr. 743 (Bankr. E.D. Pa. 1988).

and was ruled to remain discharged under a subsequent chapter seven petition;[226] the statute of limitations expired disallowing legal action to seek recovery;[227] and the debtor would have suffered undue hardship in paying back the loan.[228]

Equally before the court were cases involving chapter thirteen of the bankruptcy laws. In one case, the court held the creditor, the collection agency, and the law firm in contempt for willfully violating an automatic stay in attempting to collect a student loan debt.[229] The courts did not confirm several chapter thirteen plans because the plans were not proposed in "good faith,"[230] the debt could not be considered as a long term debt.[231] In one case, a debtor's chapter thirteen plan was modified to increase his monthly repayment since there was a substantial change in his circumstances.[232] Two chapter thirteen plans were confirmed as a result of the "good faith" on the part of debtors who devoted all of their disposable income to debt[233] and of a debtor who earned a regular income.[234]

Several debtors were found to be in breach of a service contract when they failed to complete the required service as stipulated in the award of scholarships. Two debtors failed to serve the required obligation[235] and another debtor resigned prior to service.[236]

Several issues were raised involving the collection of overdue loans. The courts upheld the Department of Education's action to offset a student's debt against a debtor's income tax return,[237] as well as state agencies' use of the same process on the state level.[238] In other cases, courts held that a student was liable for the entire balance in the case of default,[239] that payment on an overdue loan reinstated the statute of limitations,[240] that a leave of absence from school was equivalent to

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226. Edson v. Wisconsin Higher Educ. Corp., 86 Bankr. 141 (Bankr. E.D. Wis. 1988).
227. New York Higher Educ. Servs. Corp. v. Langus, 527 N.Y.S.2d 665 (App. Div. 1988).
228. Zobel v. Iowa College Aid Comm'n, 80 Bankr. 950 (Bankr. N.D. Iowa 1986).
229. Haile v. New York State Higher Educ. Servs. Corp., 90 Bankr. 51 (W.D.N.Y. 1988).
230. *In re* Newberry, 84 Bankr. 681 (Bankr. E.D. Cal. 1988); Ohio Student Loan Comm'n v. Doersam, 849 F.2d 237 (6th Cir. 1988).
231. *In re* Hayes, 83 Bankr. 2 (S.D. Ohio 1987).
232. *In re* Gronski, 86 Bankr. 428 (Bankr. E.D. Pa. 1988).
233. *In re* Adamu, 82 Bankr. 128 (Bankr. D. Or. 1988).
234. *In re* Ellenburg, 89 Bankr. 258 (Bankr. N.D. Ga. 1988).
235. United States v. Roper, 681 F. Supp. 77 (D. Me. 1988); United States v. Conway, 686 F. Supp. 571 (E.D. La. 1988).
236. United States v. Avila, 687 F. Supp. 778 (W.D.N.Y. 1988).
237. Hurst v. United States Dep't of Educ., 695 F. Supp. 1137 (D. Kan. 1988); Thomas v. Bennett, 856 F. Supp. 1165 (8th Cir. 1988).
238. Wightman v. Franchise Tax Bd., 249 Cal. Rptr. 207 (Cal. Ct. App. 1988).
239. United States v. Salzillo, 694 F. Supp. 1560 (N.D. Ga. 1988).
240. United States v. Milam, 855 F.2d 739 (11th Cir. 1988).

withdrawal requiring payment,[241] that the guarantee association was not required to disseminate standards and procedures concerning approval of forbearance to borrowers,[242] and that an indirect student loan did not allow a debtor to avoid her obligation through employment by the state.[243] A case was remanded with instructions to vacate a default judgment when a process server attempted to serve the defendant at a fraternity house in which the student had not resided for over a year.[244]

Two cases involved veterans benefits. In one case, two veterans, honorably discharged from the military, sought an extension on the ten year period of educational assistance benefits. Their request was denied on the grounds that they were disabled by primary alcoholism, ruled as willful conduct by the Veterans' Administration. The Supreme Court held that the denial of an extension did not violate section 504 which requires that federal programs not discriminate against handicapped persons solely because of their handicap.[245] In another case, a state comptroller refused to reimburse a community college the entire cost of providing veterans' scholarships since the governor and the state legislature only partially funded the program. The court[246] held that the comptroller acted properly and that the state's failure to fund the program adequately did not impose a new duty on the college.[247]

Two cases were brought to the courts which are related to financial aid tangentially. A man posted a job listing through an employment office which is a part of the financial aid office at a public university. The listing was canceled after student interviewees complained about the prospective employer. The court held that the student complaints were not public records and therefore not subject to public inspection.[248] In the second case, a parent of a prospective college student brought action against a life insurance company alleging written and oral misrepresentation. The court held that the buyer had the actual terms of the student loan available at the time of the alleged oral misrepresentation so that the buyer could not prove fraud; the buyer's claim for actual damages was remanded.[249]

A number of cases in which assistance for college costs in child

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241. Bell v. New York Higher Educ. Assistance Corp., 526 N.Y.S.2d 319 (Sup. Ct. 1987); *see also* Bell v. New York Higher Educ. Assistance Corp., 526 N.Y.S.2d 316 (Sup. Ct. 1987).

242. Higher Educ. Assistance Found. v. Singh, 416 N.W.2d 750, aff'd in part, 428 N.W.2d 384 (Minn. 1988).

243. Georgia Higher Educ. Assistance Corp. v. Geldon, 371 S.E.2d 449 (Ga. Ct. App. 1988).

244. Dorsey v. Gregg, 748 P.2d 154 (Or. Ct. App. 1988).

245. Traynor v. Turnage, 108 S. Ct. 1372 (1988).

246. Board of Trustees of Community College Dist. No. 508 v. Burris, 515 N.E.2d 1244 (Ill. 1987).

247. Ill. Rev. Stat., ch. 85, § 2201 (1983).

248. Spadaro v. University of N.M. Bd. of Regents, 759 P.2d 189 (N.M. 1988).

249. Watson v. First Commonwealth Life Ins. Co., 686 F. Supp. 153 (S.D. Miss. 1988).

support agreements were brought before the court. A professional acting school was judged not to be a college, alleviating a parent's obligation for support.[250] In another case, the language of the divorce agreement was contested. The court determined that "normal cost" additionally included room expenses, summer school tuition, and health fees.[251] In Pennsylvania, the court reversed a decision to require a father to contribute to his son's education since it would create a hardship for the father at present.[252] Finally, a court reversed a decision to apportion a child's needs and the responsibilities for a child's college education on the basis of the ratio of the parents' gross income.[253]

First Amendment

Freedom of Religion. In the District of Columbia, a private Catholic university refused to grant homosexual student associations official university recognition, prohibiting them from receiving tangible benefits and services from the university. The student groups contended that the university violated the District's Human Rights Act which prohibits educational institutions from discriminating against any individual on the basis of sexual orientation.[254] The court, affirming a lower court decision,[255] held that while the Act did not require the university to recognize the groups, it could not deny the tangible benefits on the basis of their sexual orientation. The District had compelling interest in eliminating discrimination which outweighed the burden upon the university's free exercise of religion.[256]

Freedom of Speech. A state college received a letter of inquiry setting forth alleged violations from a collegiate athletic association. Combined local and national news media alleged that the college, by not disclosing the letter to the media, violated their right of access under the first and fourteenth amendments and under the state's Open Records Act.[257] The court found no tradition of access in the state and that access to all sources of information is not mandated by the first amendment and would not play a positive role in the college and association investigations

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250. Hacker v. Hacker, 522 N.Y.S.2d 768 (Sup. Ct. 1987).
251. Rumbaugh v. Rumbaugh, 428 N.W.2d 500 (Neb. 1988).
252. Chesonis v. Chesonis, 538 A.2d 1376 (Pa. Super. Ct. 1988).
253. *In re* Marriage of Stockton, 523 N.E.2d 573 (Ill. App. Ct. 1988).
254. D.C. Code § 1-2520 (1987).
255. *See* The Yearbook of School Law 1986 at 269, Gay Rights Coalition of Georgetown Univ. v. Georgetown Univ., 496 A.2d 5677 (D.C. Cir. 1985), *vacated, reh'g granted*, 496 A.2d 578 (D.C. Cir. 1985).
256. Gay Rights Coalition of Georgetown Univ. Law Center v. Georgetown Univ., 536 A.2d 1 (D.C. 1987).
257. 51 Okla. Stat. § 24A.

and, therefore, a first amendment right of access to the letter did not exist.[258]

In a question of access to a presidential debate hosted by a state-supported university, a presidential candidate who had not been invited sued.[259] The court determined that the first amendment does not guarantee the right to communicate one's views at all times and places. A university has broad discretion in administering its affairs and can limit invitations to major candidates since such a decision was not content based.

Black football players, complaining that they were treated in a racially-discriminating manner by the coaching staff and administration, boycotted team practices and were removed from the football team. They brought suit against the university and its officials, claiming violations of their free speech, liberty, and property rights, and breach of contract.[260] The court determined that the players had no property rights or liberty interests and that no breach of contract occurred; scholarships, not positions on the football team, were promised and delivered by the university. The court found genuine issues of fact to exist on alleged violations of free speech and the plaintiffs' claim of discrimination in the award of scholarships.

A public university student appealed his conviction of wanton injury to property committed during a demonstration on campus. The plaintiff alleged that the legal action was retaliation for his exercise of free speech. The court affirmed the lower court, finding no evidence of retribution due to the content of the defendant's speech.[261]

A journalism instructor at a community college brought suit for an alleged violation of first amendment rights when funding for the community college student newspaper was terminated.[262] The court affirmed that the editorial content of the student newspaper was not the substantial or motivating factor in the decision but rather the plaintiff's failure to comply with student government fiscal policies. A related case involved the termination of the legal services office at a public university.[263] The district court held that the office, originally authorized by the university's board of trustees, was, at most, a limited public forum and that the board's termination of the office and services was content-neutral and, therefore, was not violative of the first amendment.

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258. Combined Communications Corp. of Okla., Inc. v. Boger, 689 F. Supp. 1065 (W.D. Okla. 1988).

259. Martin-Trigona v. University of N.H., 685 F. Supp. 23 (D.N.H. 1988).

260. Hysaw v. Washburn Univ. of Topeka, 690 F. Supp. 940 (D. Kan. 1987).

261. Commonwealth of Ruddock, 520 N.E.2d 501 (Mass. Ct. App. 1988).

262. Olson v. State Bd. for Community Colleges and Occupational Educ., 759 P.2d 829 (Colo. Ct. App. 1988).

263. Student Gov't Ass'n v. Board of Trustees of Univ. of Mass., 676 F. Supp. 384 (D. Mass. 1987).

The Fourth Circuit Court affirmed a district court decision[264] approving a university's revised lawn-use policy. The policy requiring the removal of symbolic shanties erected by students was content-neutral, narrowly tailored to meet a significant government interest, and left open other channels of communication consistent with the first amendment.[265] In another case, an association of university students and faculty members alleged that regulations controlling the university's designated public forum denied them their rights under the first and fourteenth amendments. The court found that the university's regulations were content-neutral, not ambiguous, and reasonable designations of time, place, and manner of speech.[266]

Freedom of Expression. The Eighth Circuit Court reversed a lower court's dismissal[267] of a gay student association suit against public university officials for violation of the association's first amendment rights as a result of the denial of funding requests. The case presents a live issue as the action is capable of repetition yet may evade review. State action was present since the university official, through an appeals process, had the final determination in funding. The denial of funding was found to be content-motivated and a violation of the association's first amendment rights resulted.[268]

In a case previously before the courts,[269] the litigation concerned commercial free speech. At trial,[270] the joint plaintiffs (students and the corporation) were denied sales activities in dormitory rooms. On appeal by the students, the court, reversing the previous decision, held that students had the constitutional right to receive information in their public university dormitory rooms. The case was remanded to review the university's regulation limiting commercial solicitation in dormitory rooms.[271]

Freedom of Association. In California, students at a public university alleged that a mandatory student activities fee was a violation of their constitutional rights of association and speech and of the establishment clause.[272] The court determined that the board of regents, deriving its

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264. *See* The Yearbook of Education Law 1988 at 253, Students Against Apartheid Coalition v. O'Neil, 660 F. Supp. 33 (W.D. Va. 1987); 671 F. Supp. 1105 (W.D. Va. 1987).

265. Students Against Apartheid Coalition v. O'Neil, 838 F.2d 725 (4th Cir. 1988).

266. Auburn Alliance for Peace and Justice v. Martin, 684 F. Supp. 1072 (M.D. Ala. 1988).

267. *See* The Yearbook of Education Law 1988 at 255, Gay and Lesbian Students Ass'n v. Gohn, 656 F. Supp. 1045 (W.D. Ark. 1987).

268. Gay and Lesbian Students Ass'n v. Gohn, 850 F.2d 361 (8th Cir. 1988).

269. *See* The Yearbook of Education Law 1988 at 308, American Future Sys. v. State Univ. of Cortland, 565 F. Supp. 754 (N.D.N.Y. 1983).

270. *See* The Yearbook of Education Law 1988 at 254, Fox v. Board of Trustees of State Univ. of N.Y., 649 F. Supp. 1391 (N.D.N.Y. 1986).

271. Fox v. Board of Trustees of State Univ. of N.Y., 841 F.2d 1207 (2d Cir. 1988).

272. Smith v. Regents of Univ. of Cal., 248 Cal. Rptr. 263 (Ct. App. 1988).

power from the state Constitution, has the authority to assess a mandatory student activities fee as a condition of enrollment. Furthermore, organizations involved in political or religious activities were ineligible for funding. Membership in the student government association is voluntary; students are not compelled to join. The need for student government justifies any interference with associational rights.

Dismissal

Disciplinary Dismissal. Two disciplinary dismissal cases questioned the involvement of state action in private colleges. Private college students on the editorial board of an independent student newspaper dismantled a symbolic protest of the college's South African investments erected by other students and conducted a "sting" operation on a local inn to expose the alleged sale of alcohol to underage students. The students brought action against the college and its officials alleging that the disciplinary action resulting from their conduct violated their constitutional rights.[273] The court dismissed the case finding that there was no relationship between the private college and the state. No state action existed to satisfy section 1983 liability.[274]

In a second case,[275] students were suspended from a private college after violating a restraining order enjoining them to vacate the administration building and ignoring the explicit warnings of the dean of students.[276] The students alleged that the college was a state actor by virtue of a 1969 state statute[277] requiring colleges to adopt disciplinary rules to maintain public order on campus, mandating the private institution to uphold the same guarantees required of the state under the United States Constitution. The Second Circuit Court held that under the Henderson Act, the state never sought to compel schools to enforce their rules or inquire about enforcement; state action did not exist. The case was remanded to allow the appellants to amend their complaint under the statute which applies to acts of private racial discrimination.[278]

Two students brought separate actions against their institutions seeking injunctive relief from the decisions of disciplinary hearings. In Rhode Island, a student at a public university alleged violation of his constitutional rights of due process.[279] Bias was not present when an administrator with

273. Stone v. Dartmouth College, 682 F. Supp. 106 (D.N.H. 1988).
274. 42 U.S.C. § 1983.
275. Albert v. Carovano, 851 F.2d 561 (2d Cir. 1987).
276. *See* The Yearbook of Education Law 1988 at 255, Albert v. Carovano, 824 F.2d 1333 (2d Cir. 1987).
277. N.Y. Education Law § 6450 (McKinney 1985).
278. 42 U.S.C. § 1981.
279. *See* The Yearbook of School Law 1987 at 266, Gorman v. University of R.I., 837 F.2d 7 (1st Cir. 1988).

previous involvement with the case was the hearing officer. While the plaintiff was denied the opportunity to tape the proceedings, written accounts sufficed. Denial of legal counsel but access to advice and cross-examination provision adequately conformed to due process requirements. The district court held that the disciplinary hearings violated the student's right to due process.[280] The First Circuit Court found that there was no deprivation of due process. In the second case, a student in a private college requested a preliminary injunction against a one-year suspension from attendance at college. The court upheld the denial of the injunction as the student failed to establish irreparable harm.[281]

A student dismissed from a proprietary business school for alleged disruptive conduct brought suit for breach of contract.[282] On remand from an appeal,[283] the trial court found that the student breached her contractual duties as a responsible adult by creating turmoil. The appeals court, finding that the school did not prove that the plaintiff disrupted the scholastic program, reversed the judgment and ordered the return of tuition and the payment of general damages for the delay in the student's academic career.

A first year medical student in a private university sought to annul a penalty of a compulsory one-year leave of absence for cheating on an examination for the second time.[284] A New York appeals court held that the university's determination in an academic dishonesty disciplinary action was neither arbitrary nor capricious, that the penalty was not unfair, and that state financial assistance alone does not invoke state action and therefore due process requirements. In a second academic dishonesty disciplinary case, a black law student accused of plagiarism brought suit against the law school alleging violation of his civil rights. The court of appeals, affirming a lower court decision, found that recusal by the judge who had graduated from the law school was not required but, while retaining jurisdiction, remanded the case for an evidentiary hearing concerning the judge's impartiality.[285]

Academic Dismissal. Four cases challenged the application of due process procedures. Ten former nursing students at a public university's

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280. Gorman v. University of R.I., 646 F. Supp. 799 (D.R.I. 1986).

281. Schulman v. Franklin & Marshall College, 538 A.2d 49 (Pa. Super. Ct. 1988).

282. *See* The Yearbook of School Law at 1986 at 279, Fussell v. Louisiana Business College of Monroe, 519 So. 2d 384 (La. Ct. App. 1988).

283. *See* The Yearbook of School Law 1986 at 279, Fussell v. Louisiana Business College of Monroe, 478 So. 2d 652 (La. Ct. App. 1985).

284. Beilis v. Albany Medical College of Union Univ., 525 N.Y.S.2d 932 (App. Div. 1988).

285. Easley v. University of Mich. Bd. of Regents, 853 F.2d 1351 (6th Cir. 1988). *See also* The Yearbook of School Law 1987 at 266, 632 F. Supp. 1539 (E.D. Mich. 1986), 627 F. Supp. 580 (E.D. Mich. 1986); *see also* The Yearbook of School Law 1986 at 272, 619 F. Supp. 418 (E.D. Mich. 1985).

college of nursing appealed a lower court's dismissal of their complaint against the trustees and officials of the college.[286] The students were dismissed from the program and alleged that they were deprived of due process. They further alleged that the dismissals resulted from an effort to reduce the number of graduates from the program. The Seventh Circuit Court affirmed that state officials were entitled to qualified immunity from damages in their official capacities under the eleventh amendment, but reversed as error the lower court decision which dismissed the injunctive relief claim.

In a second nursing school case, a third-year student in a hospital school was dismissed from the program after having failed to meet seven specific clinical objectives. The student brought action against the school alleging a violation of due process.[287] The Court of Appeals affirmed that the student was clearly advised of the requirements, given notice of her deficiencies and given an opportunity to respond. The administration followed its established procedures for academic dismissal and gave the student an opportunity to reapply. The dismissal was not arbitrary and capricious. Damages were moot since the student completed her nursing education at another school.

A medical resident brought suit against the hospital and several doctors, alleging sex discrimination and a violation of due process after receiving an unsatisfactory academic evaluation.[288] The court determined that the hospital and one doctor who employed the student did not have immunity from suit under a statute covering discrimination in employment[289] resulting from an unfavorable evaluation. Since the evaluation was academic, not disciplinary, no liberty or property right was at stake, triggering procedural due process. In another case, a doctor serving a residency at a hospital brought action against the state for breach of contract when she was prohibited from entering her third year of residency. The court dismissed the claim since the employment contract was not filed with and approved by the state comptroller and since an appointment for residency, like student academic performance questions, was a professional discretionary action and, therefore, was nonjusticiable.[290]

In Delaware, a student in a public university brought suit for alleged violations of her civil rights and for breach of contract.[291] The student,

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286. Akins v. Board of Governors of State Colleges and Univs., 840 F.2d 1371 (7th Cir. 1988).

287. Morin v. Cleveland Metro. Gen. Hosp. School of Nursing, 516 N.E.2d 1257 (Ohio Ct. App. 1986).

288. Samper v. University of Rochester Strong Memorial Hosp., 528 N.Y.S.2d (Sup. Ct. 1987).

289. New York Human Rights Law Section 296; Education Law Section 6527; Public Health Law Sections 2805-j and 2805-m 3.

290. Lachia v. State, 528 N.Y.S.2d 963 (Ct. Cl. 1988).

291. Paoli v. University of Del., 695 F. Supp. 171 (D. Del. 1988).

majoring in elementary teacher education, enrolled in an optional academic program in order to receive teacher certification. She failed a teaching methods course (a prerequisite for student teaching), never retook the course, never student taught, and never achieved teacher certification. The court found that failure to achieve teacher certification was a voluntary action for which the institution is not held accountable. Additionally, the university demonstrated that it consistently enforced the teacher certification requirements and its action was not arbitrary and capricious for similarly situated students.

The Fourth Circuit Court affirmed the dismissal of a doctor's suit against a public university, a hospital, and several individual doctors alleging libel and slander.[292] The doctor was ineligible to take his board certification due to an unsatisfactory clinical skills rating in his residency program. The court determined that the doctor failed to make a sufficient, timely effort to see his university records, allowing the time to file a defamation suit to run out.

Two cases of licensing of professionals by the state concern issues similar to those dealt with in academic dismissal questions. Two graduates of a medical school in the Dominican Republic were denied medical licenses by the New York Department of Education. A lower court granted the applications of the graduates individually to have the determinations annulled. On appeal, the court confirmed the determinations and dismissed the petitions.[293] The graduates' records did not demonstrate that they completed their medical education at a school which met the department's requirements, that they completed an integrated program of medical education as prescribed by the department, or that they completed clinical rotations as a part of an integrated, supervised program.

In a second case involving professional licensing, two petitioners with Ph.D. degrees in counselor education sought admission to the state's licensing examination in psychology. Their applications were denied by the state board of regents on the determination that they had not substantially met the requirements of a doctoral program in psychology. A lower court[294] dismissed an appeal request. On an appeal of the lower court decision, the court determined that the term "substantial equivalent" referred to the content of a program, not to the degree.[295] The court upheld the board, finding that the counselor education doctoral program was not designed as preparation for the professional practice of psychology.

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292. Rozas v. Department of Health and Human Resources, 522 So. 2d 1195 (La. Ct. App. 1988).

293. McDonagh v. Ambach, 528 N.Y.S.2d 730 (App. Div. 1988).

294. *See* The Yearbook of Education Law 1988 at 254. Fox v. Board of Regents of State of N.Y., 649 F. Supp. 1393 (N.D.N.Y. 1986).

295. Fox v. Board of Regents of State of N.Y., 527 N.Y.S.2d 651 (App. Div. 1988).

Other Constitutional Issues

Black and Hispanic alumni of a college which is a branch of a public university formed an alumni association dedicated to the concerns of minority students and alumni. The alumni alleged that the college administration selectively refused to grant recognition to the association, thereby violating their freedom of speech and equal protection rights. The court, vacating and remanding, found that the determination of racial discrimination demands sensitive inquiry and was necessary to determine whether the college's justification for its denial of official recognition was nondiscriminatory.[296]

A $217 controversy has stretched over seven years. The Puerto Rican Department of Consumer Affairs ordered an institution to reimburse tuition for cancellation of classes following a strike. The president and trustees of the university brought action for nullification of the order requiring the reimbursement to the student. The first circuit held that the department's decision requiring reimbursement to the student was insufficient to establish a first amendment claim under the freedom of educational process doctrine.[297]

The Immigration and Naturalization Service determined that a Korean, nonimmigrant exchange scholar, married to an American citizen, was required in compliance with the terms of the Fulbright program, to return to Korea for two years before permanent residence status could be received. The court held that the service abused its discretion by not waiving the requirement due to exceptional hardship suffered by an American citizen and granted summary judgment to the scholar and her husband.[298]

LIABILITY

Personal Injury

Personal injury litigation included cases involving death, bodily injury, libel, defamation, breach of professional-client relationship, and battery. Questions of liability surround each of these types of cases. In the case involving a death, an Illinois court found that damages based on lost salary calculated to reflect testimony that he would eventually have been dean of the college, could be awarded to a deceased professor's wife.[299] An airline was held responsible for the professor's wrongful

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296. Ad-Hoc Comm. of Baruch Black and Hispanic Alumni Ass'n v. Baruch College, 835 F.2d 980 (2d Cir. 1987).

297. Cuesnongle v. Ramos, 835 F.2d 1486 (1st Cir. 1987).

298. Younghee Na Huck v. Attorney General of United States, 676 F. Supp. 10 (D.D.C. 1987).

299. Lorenz v. Air Ill., Inc., 522 N.E.2d 1352 (Ill. App. Ct. 1988).

death. A hazing incident involving a student organization indirectly affiliated with a campus Air Force Reserve Officer Training Corps resulted in the wrongful death of a student and a suit by the parents of the deceased.[300] The court found that the organization was an unrecognized group containing R.O.T.C. students whose supervision was a discretionary function of the Air Force, barring suit for wrongful death. A federal district court denied summary judgment in a wrongful death emanating from a shooting in a residence hall.[301] The student and her roommate were both shot and killed by her roommate's suitor. The court found that material facts existed as to whether the university had reason to have foreseen the crime and breached its contract by failing to maintain proper security within the residence hall.

Bodily injury cases were also litigated and involved incidents which took place on the institution's property. A Kansas court found that an institution had immunity from injury resulting from recreational use of public property.[302] The court also ruled that the institution which failed to prohibit sledding, but installed warning signs and put padding around trees, was not liable for wanton and negligent behavior when it had a sign-out policy for cafeteria trays. In California, a court found that the school did not have a duty to adequately light and monitor the exterior of a building so as to prevent assaults for which a student had sustained injury.[303] An Ohio court found that a university was not liable for the injury sustained by the plaintiff who stepped off the sidewalk onto a dirt path on campus and fell.[304] An Indiana court found that the institution's duty to the plaintiff ceased when she stepped from the campus bus on to a grassy strip, and was subsequently hit by a car while attempting to cross the street behind the bus.[305] However, in another case on appeal, a court reversed the dismissal of a case by the lower court finding that the naming of the specific administrator responsible for maintaining the jogging path upon which the student was injured would not bar the hearing of the case.[306] A Missouri court found that an employee's remedy was workmen's compensation[307] for injury sustained on a parking lot, while a Nebraska court found that the institution created a hazardous condition in the piling of snow on a parking lot which resulted in ice, causing the plaintiff to slip, fall, and sustain injuries.[308]

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300. Del Valle v. United States, 856 F.2d 406 (1st Cir. 1988).
301. Nieswand v. Cornell Univ., 692 F. Supp. 1464 (N.D.N.Y. 1988).
302. Boaldin v. University of Kan., 747 P.2d 811 (Kan. 1987).
303. Donnell v. California W. School of Law, 246 Cal. Rptr. 199 (Ct. App. 1988).
304. Thompson v. Kent State Univ., 521 N.E.2d 526 (Ohio Ct. Cl. 1987).
305. Heger v. Trustees of Ind. Univ., 526 N.E.2d 1041 (Ind. Ct. App. 1988).
306. Daily v. University of Wis., Whitewater, 429 N.W.2d 83 (Wis. Ct. App. 1988).
307. Heskett v. Central Mo. State Univ., 745 S.W.2d 712 (Mo. Ct. App. 1987).
308. Russell v. Board of Regents of Univ. of Neb., 423 N.W.2d 126 (Neb. 1988).

Cases involving bodily injury in campus housing were also before the courts. An Oregon court found no institutional liability when a woman was injured when she stepped in a hole while trick-or-treating with her children.[309] In North Carolina, an appellate court reversed a judgment[310] finding that the replacement of the storm door screen with glass was not reasonably prudent given the circumstances that the tenet's son was known to push on that part of the door.[311] A Kansas university was held liable for injuries sustained when an individual fell in a stairwell where the lights were burnt out.[312] However, a court did not find the architect who designed the building in 1971 liable when, in 1982, a student tripped in a stairwell, fell through a screen, and sustained injuries in the three story fall.[313] The statute of limitations for this type of liability was ten years.

Liability for injuries sustained in the course of involvement in university sanctioned or sponsored events held off campus was also litigated. In Louisiana, members of a women's basketball team were involved in an accident in a van owned by a private individual and driven by a team member.[314] The court found that students on scholarships were not employees obligating the university to pay damages for injuries sustained by the other party involved in the accident. In Pennsylvania, the district court issued a summary judgment in favor of the university and its security division in an incident which culminated in the drowning of an individual.[315] While the drowning victim was stopped for a motor vehicle violation, he evaded university security officers by jumping into the river and later analysis found a blood alcohol level of .17. Another federal court issued a summary judgment to an institution when a volunteer was injured in a motor vehicle accident while being transported to the refugee camp from the living quarters by a private carrier.[316]

Bodily injury cases involved intentional tort claims. In Ohio, the court reheard a remanded decision[317] finding that the college lacrosse player who flipped an opponent during play was not liable for the injury sustained by the opponent.[318] In a case involving academic requirements, the court found that the eleventh amendment immunity barred the plaintiff's suit

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309. Bellikka v. Green, 746 P.2d 255 (Or. Ct. App. 1987).

310. See The Yearbook of Education Law 1988 at 264, Bolkhir v. North Carolina State Univ., 355 S.E.2d 786 (N.C. Ct. App. 1987).

311. Bolkhir v. North Carolina State Univ., 365 S.E.2d 898 (N.C. 1988).

312. Burch v. University of Kan., 756 P.2d 431 (Kan. 1988).

313. Leeper v. Hillier Group, Architects Planners, P.A., 543 A.2d 258 (R.I. 1988).

314. Nelson v. Ronquillo, 517 So. 2d 454 (La. Ct. App. 1987).

315. Lach v. Robb, 679 F. Supp. 508 (W.D. Pa. 1988).

316. Chen v. Georgetown Univ., 685 F. Supp. 83 (S.D.N.Y. 1988).

317. See The Yearbook of School Law 1987 at 269, Hanson v. Kynast, 494 N.E.2d 1091 (Ohio 1986).

318. Hanson v. Kynast, 526 N.E.2d 327 (Ohio Ct. App. 1987).

alleging injury when he was required to read texts which contained profane language.[319]

Cases involving libel or slander were also before the courts. Control of an experimental device used in the treatment of cancer resulted in one university employee making slanderous statements against another employee.[320] The employee was successful in his slander claim. However, in a companion case, the court found that the insurance company was not liable for damages when one employee sues another.[321] In New York, the long arm statutes of the state could not reach the alleged defamatory statements about a New York coach's deed published in California by a California resident who conducted no business in New York, and whose daughter was an alumnus of the New York institution.[322]

In a case involving a person diagnosed as HIV positive, the plaintiff sustained a claim of a breach of the physician-patient privilege when the doctor asked and the patient agreed to having his picture silhouette taken, but was not informed that it would be published in the local newspaper in an article about AIDs research.[323] In another AIDs case, the court refused to grant a summary judgment to a university affiliated hospital.[324] The court found material issues existed as to whether the giving of transfusions, without parental consent, to a premature newborn who required them to fight a potentially fatal condition constituted battery.

A number of cases involved questions of immunity. When an Illinois worker was injured by equipment provided by an Indiana university, the court found that immunity questions were settled by Illinois law, and a suit for tortuous acts could be brought against the Indiana institution.[325] Two injury cases were dismissed because of eleventh amendment immunity of state universities.[326] In Mississippi, the court found that a football coach, athletic trainer, and a doctor at a public state university had qualified immunity against a suit for liable.[327] The suit arose from the death of a player who became ill during practice.

Workers' Compensation

Workers' compensation involved litigation on procedures, jurisdiction,

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319. Boles v. Gibbons, 694 F. Supp. 849 (M.D. Fla. 1988).
320. Raymond U v. Duke Univ., 371 S.E.2d 701 (N.C. Ct. App. 1988).
321. St. Paul Mercury Ins. Co. v. Duke Univ., 849 F.2d 133 (4th Cir. 1988).
322. Talbot v. Johnson Newspaper Corp., 527 N.Y.S.2d 729 (Ct. App. 1988).
323. Anderson v. Strong Memorial Hosp., 531 N.Y.S.2d 735 (Sup. Ct. 1988).
324. Kozup v. Georgetown Univ., 851 F.2d 437 (D.C. Cir. 1988).
325. Schoeberlein v. Purdue Univ., 521 N.E.2d 1215 (Ill. App. Ct. 1988).
326. Everhart v. University of Miss., 695 F. Supp. 883 (S.D. Miss. 1988); Houghton v. Board of Regents of Univ. of Wash., 691 F. Supp. 800 (S.D.N.Y. 1988).
327. Sorey v. Kellett, 849 F.2d 960 (5th Cir. 1988); *see* The Yearbook of School Law 1987 at 261, Sorey v. Kellett, 673 F. Supp. 817 (S.D. Miss. 1987).

eligibility, injury, and damages. On the question of jurisdiction, a Massachusetts' court ruled that the decision of a single member of the compensation board was final and that the employee's claim should be paid at the highest rate.[328] Another claim was dismissed because the statute of limitations (two years) had been exceeded between the injury and the filing of the claim.[329]

One case involved the eligibility of an employee. The court found that the university was liable for the death benefits awarded to the widow of a worker on loan from a contractor, but supervised by the university, when he was electrocuted while working on the campus.[330]

Several cases involved the cause of the disabling injury. A New York court dismissed the compensation claim of an employee injured while riding his bicycle to work.[331] However, another court found that the institution was liable in the injury of a dormitory employee working in an empty building.[332] The worker was assaulted by her former boyfriend who was assisted in locating her by co-workers. A Nebraska court dismissed a claim in which twenty months elapsed between the alleged injury and complaint to a doctor.[333]

Damage awards were also in dispute. A North Carolina court ruled that a state statute prohibited the relief of the employer's compensation responsibilities through a contract which offered full salary from other sources.[334] That state court also ruled that attorneys' fees could be awarded by the industrial commission as part of a claim.[335]

Contract Liability

Cases involving contract liability include issues of breach of contract, contract termination, and bidding for contracts. An Alabama case dealt with the question of a breach of warranty or fraud.[336] The case involved allegedly defective equipment leased from a finance company but supplied by another corporation. The court found that the lessor finance corporation could not be held liable for the breach of warranty and fraud charges brought against the supplier. In another case, a university hospital brought charges of a contract breach in an attempt to recover

328. Gordon's Case, 524 N.E.2d 1379 (Mass. App. Ct. 1988).
329. Taylor v. Vassar College, 530 N.Y.S.2d 289 (App. Div. 1988).
330. Virginia Polytechnic Inst. and State Univ. v. Frye, 371 S.E.2d 34 (Va. Ct. App. 1988).
331. Kapogiannis v. Vassar College, 530 N.Y.S.2d 293 (App. Div. 1988).
332. Raybol v. Louisiana State Univ., 520 So. 2d 724 (La. 1988).
333. Kuticka v. University of Neb.-Lincoln, 418 N.W.2d 593 (Neb. 1988).
334. Estes v. North Carolina State Univ., 365 S.E.2d 160 (N.C. Ct. App. 1988).
335. Karp v. University of N.C., 362 S.E.2d 825 (N.C. Ct. App. 1987).
336. Lawson State Community College v. First Continental Leasing Corp., 529 So. 2d 926 (Ala. 1988).

fees from the spouse of a patient given medical services.[337] The court found that abandonment of the spouse by the patient was a defense to the suit. In Missouri, a court found that the college had breached a contract with a health club when it failed to provide adequate space.[338] However, the case was remanded with instructions due to an error in the method of computing damages. In another case, the court affirmed a summary judgment to the manufacturer when the college waited six years to file a claim after discovering defective materials used in a new building.[339] In Michigan, the court found that the state's long arm statute would not reach an out of state corporation which did not conduct continuous business in the state.[340]

Termination of contracts were also litigated. In Alabama, the court found that the state board of adjustments would protect the due process rights of a linen company contract terminated by a public university.[341]

The terms of insurance contracts were litigated. In Pennsylvania, the court affirmed a summary judgment in favor of the insurer.[342] Failure of the institution to notify them of the suit by a disgruntled employee, to request defense provisions, and refusal of counsel figured into the court's decision. In another case, a similar result was reached when the institution failed to notify the insurer until after it had struck a settlement agreement with a governmental agency.[343] In South Dakota, the court found that a student group insurance policy covered the student's newborn because the insurance policy fit under the state law definition of a blanket insurance policy.[344]

Procedures surrounding bids for contracts were before the courts. In one case, a bidder's complaint was dismissed because the appeal procedures were yet to be completed when the suit was filed.[345] In another case, the court reversed and remanded a lower court decision because the institution had failed to publish on the notice of rejection the proscribed information concerning the procedures to appeal a rejected bid.[346] A New York court held that the City University of New York was not held to the municipal laws requiring the break up or fractionalizing

337. Yale Univ. School of Medicine v. Collier, 536 A.2d 588 (Conn. App. Ct. 1988).
338. Lowder v. Missouri Baptist College, 752 S.W.2d 425 (Mo. Ct. App. 1988).
339. Milwaukee Area Vocational Technical Dist. and Adult Educ. v. United States Steel Corp., 847 F.2d 435 (7th Cir. 1988).
340. Andrews Univ. v. Robert Bell Indus., Ltd., 685 F. Supp. 1015 (W.D. Mich. 1988).
341. Medical Laundry Serv., Inc. v. Board of Trustees of Univ. of Ala., 840 F.2d 840 (11th Cir. 1988).
342. Widener Univ. v. Fred S. James & Co., 537 A.2d 829 (Pa. Super. Ct. 1988).
343. Harrisburg Area Community College v. Pacific Employers Ins. Co., 682 F. Supp. 805 (M.D. Pa. 1988).
344. Cullum v. Mutual of Omaha Ins. Co., 840 F.2d 619 (8th Cir. 1988).
345. Bowers Office Prod., Inc. v. University of Alaska, 755 P.2d 1095 (Alaska 1988).
346. Capital Copy Inc. v. University of Fla., 526 So. 2d 988 (Fla. Dist. Ct. App. 1988).

of various tasks within the total project.[347] In an Illinois case, the court found that concealment of design defects, threats of subcontractor termination, and false backcharges were insufficient to reach a claim of racketeering activity.[348]

Deceptive Practices

Several cases involved claims that an institution had engaged in deceptive practices. In Ohio, the court ruled that a student had failed in her charge that the university had misrepresented a graduate degree when she discovered that she could not be certified to teach English at the end of the academic year.[349] The student failed to provide corroborating evidence that she had asked for and was promised a degree to teach English as opposed to speech communication which the school maintained she was working towards. Furthermore, the court found the student negligent in not reading the college catalogue which clearly outlined the degree requirements.

In another case, an employee alleged that the institution concealed from him his illness acquired through exposure on the job to beryllium dust.[350] A summary judgment in favor of the institution was affirmed based on the finding that no damage resulted from the alleged fraud and conspiracy.

Negligence

Cases involving negligence included an Alabama case of the wrongful death of a participant struck by a vehicle when crossing the road during a fraternity hay ride.[351] The state supreme court found that the organizer of the hay ride was not negligent even though alcohol was served to minors, the provider of the wagon for the hayride was not a "common carrier" implicating a higher duty of care, nor was the driver of the pickup which pulled the wagon guilty of wanton negligence when he stopped the vehicle on a level stretch of road to allow participants to relieve themselves. In another case, alcohol served at a local fraternity party to a minor who was then injured, resulted in a suit against the national fraternity. The court remanded the case with instructions that the issue was whether the national

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347. Michael Mazzeo Elec. Corp. v. Murphy, 522 N.Y.S.2d 798 (Sup. Ct. 1987).

348. Brandt v. Schal Assocs. Inc., 854 F.2d 948 (7th Cir. 1988); *see* The Yearbook of Education Law 1988 at 262. Brandt v. Schal, Inc., 664 F. Supp. 1193 (M.D. Ill. 1987).

349. Hershman v. University of Toledo, 519 N.E.2d 871 (Ohio Ct. Cl. 1987).

350. Kelman v. University of Chicago, 519 N.E.2d 708 (Ill. App. Ct. 1988).

351. Alpha Zeta Chapter of Pi Kappa Alpha Fraternity v. Sullivan, 740 S.W.2d 127 (Ark. 1987).

fraternity intentionally rendered substantial assistance in serving alcohol to the minor.[352]

In Vermont, victims of a shooting by a university student previously involved in a similar incident brought negligence charges against the university where the student was enrolled.[353] The court granted summary judgment to the university finding no duty of care for the student's criminal act. In a case involving a university hospital resident, the court found that the resident had no duty to advise a surgeon concerning a warning of the dangers of surgery given by an outside specialist and communicated to the resident by the patient.[354]

Medical Malpractice

A number of cases were heard involving medical malpractice suits against university hospital physicians. The issues include cases involving a finding of negligence, the time period within which a claim can be brought, and questions of access to care review committee reports conducted by the hospital. In Alabama, the court denied a summary judgment finding issues to be resolved at trial in the physician's failure to order a cesarean section causing the newborn to be injured during birth.[355] In another case, the jury awarded over two million dollars in damages to the parents of an infant whose penis was burnt off during a circumcision procedure.[356] Damages were awarded where a university veterinary hospital wrapped a horse's tail too tightly and it had to be amputated.[357]

Several cases were dismissed because the statute of limitations had been exceeded in filing the claim.[358] In another case, the court ruled that members of a physicians care standards committee could be compelled to testify in a malpractice suit.[359] On appeal, the state supreme court found that there is no waiver of privilege which allows discovery of hospital peer review committee deliberations.[360]

Indemnification

In a case on appeal, the court held that the insurance company's

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352. Jefferis v. Commonwealth, 537 A 2d 355 (Pa. Super. Ct. 1988).
353. Smith v. Day, 538 A 2d 157 (Vt. 1987).
354. Cornell v. Ohio State Univ. Hosps., 521 N.E. 2d 837 (Ohio Ct. Cl. 1987).
355. James v. Woolley, 523 So. 2d 110 (Ala. 1988).
356. Felice v. Valleylab, Inc., 520 So. 2d 920 (La. Ct. App. 1988).
357. Carter v. Louisiana State Univ., 520 So. 2d 383 (La. 1988).
358. Lenhard v. Butler, 745 S.W. 2d 101 (Tex. Ct. App. 1988). Narins v. DeBrovner, 529 N.Y.S. 2d 316 (App. Div. 1988). Roseman v. Hospital of Univ. of Pa., 547 A 2d 751 (Pa. Super. Ct. 1988).
359. Emory Univ. v. Houston, 364 S.E. 2d 70 (Ga. Ct. App. 1987).
360. Emory Clinic v. Houston, 369 S.E. 2d 913 (Ga. 1988).

policies expressly excluded claims involving the intentional denial of a former professor's constitutional rights.[361] The insurance company was not required to defend the institution in this suit.

ANTITRUST

In a case on appeal, the circuit court of appeals found that Rocky Mountain State University was not in violation of the Sherman Act[362] when they decided to allow only one spring retail show in their minidome, used a contract to determine the highest bidder, and awarded the highest bidder a five-year contract to provide the show.[363] The court found that the plaintiffs were unable to establish that the minidome was the only facility in the area to hold such a show.

Patents and Copyrights

In one patent case, the corporation waived its attorney-client privilege when it used its communication as a defense against willful and deliberate infringement.[364] The court found that it would be inequitable for the corporation and its attorney to be selective in which communication it provided. In a case involving a patent for DNA synthesis, the court found that a corporation had a reasonable apprehension of being sued to ask for a declaratory judgment on the validity of its patent when it received a letter challenging the patent.[365] In another case, a patient's cells were used to produce a pharmaceutical product of enormous therapeutic and commercial value.[366] Based on the doctrine of conversion, the patient had both decision-making and financial interest in the product developed from his tissue.

In a copyright suit over a photograph, the court found that the institution and the officer in her official capacity were protected by immunity from suit, but the director was not immune in her individual capacity.[367] In another case, a court found that a software developer did not infringe a copyright when it reproduced information in a new

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361. Brooklyn Law School v. Aetna Casualty and Sur. Co., 849 F.2d 788 (2d Cir. 1988); *see* The Yearbook of Education Law 1988 at 263, Brooklyn Law School v. Aetna Casualty and Sur. Co., 661 F. Supp. 445 (E.D.N.Y. 1987).

362. The Sherman Anti-trust Act, 15 U.S.C. §§ 1,2 (1978).

363. Ferguson v. Greater Pocatello Chamber of Commerce, 848 F.2d 976 (9th Cir. 1988); *see* The Yearbook of School Law 1987 at 275, Ferguson v. Greater Pocatello Chamber of Commerce, 647 F. Supp. 190 (D. Idaho 1985).

364. Trustees of Leland Stanford Jr. Univ. v. Coulter Corp., 118 F.R.D. 532 (S.D. Fla. 1987).

365. Millipore Corp. v. University Patents, Inc., 682 F. Supp. 227 (D. Del. 1987).

366. Moore v. Regents of Univ. of Cal., 249 Cal. Rptr. 494 (Ct. App. 1988).

367. Richard Anderson Photography v. Brown, 852 F.2d 114 (4th Cir. 1988).

format from correlation tables of a copyrighted standardized test.[368] In another case, the court found that the state's voluntary involvement in copyright activity did not waive the eleventh amendment immunity protection and the Copyright Act[369] did not require the waiving of immunity protections by state agencies.[370]

Estates and Wills

A federal district court ruled that it had jurisdiction in a claim to assert the right to the proceeds of a trust even when the will was probated in state court.[371] In another case, the court ruled that to use for tax purposes the value of a residential home in assigning worth to a mansion located in a downtown area donated to the college was error.[372]

Several cases contested the validity of a will or trust. In Kentucky, a court ruled that the lower court abused its discretion in reforming a trust which on its face was void.[373] The testators had created a private trust which violated the rules against perpetuities. In a Wyoming case, nieces and nephews of the testator who turned his estate over to a college were unsuccessful in a challenge of the mental capacity of the testator at the time the will was executed.[374]

368. Regents of Univ. of Minn. v. Applied Innovations, Inc., 685 F. Supp. 698 (D. Minn. 1987).

369. Copyright Act of 1979, 17 U.S.C. §§ 101-810 (1982).

370. BV Engineering v. University of Cal., Los Angeles, 858 F.2d 1394 (9th Cir. 1988).

371. Sisson v. Campbell Univ., Inc., 688 F. Supp. 1064 (E.D.N.C. 1988).

372. Estate of D. D. Palmer v. Commissioner, 839 F.2d 420 (8th Cir. 1988).

373. University of Louisville v. Isert, 742 S.W.2d 571 (Ky. Ct. App. 1987).

374. Estate of Roosa v. Northern Wy. Community College Found. of Sheridan, 753 P.2d 1028 (Wy. 1988).

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